Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

BEVERLY B. MANN,
Petitioner,

v.

THE CITY OF CHICAGO, JAMES MONTGOMERY, JAYNE BARNARD AND TIMOTHY O'HARA,
Respondents.

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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122pp

QUESTIONS PRESENTED

QUESTION 1

Does the use by a federal court of appeals of a circuit rule that permits the resolution of appeals by unreported order that will apply only in that lawsuit, rather than by reported opinion, constitute an unconstitutional denial of the right to due process of law as guranteed by the Fifth Amendment to the Constitution if the unreported order effectively declares a previously nonexistent rule of law either by contradicting existing law or by resolving a question of first impression?

QUESTION 2

Does an unreported appellate order that without comment affirms summary judgments and a bench verdict constitute an unconstitutional denial of due process of law because it fails to inform the appellant of the bases for the rulings, because it lacks any evidence of actual consideration by that court of the grounds for appeal, and because it significantly impairs the appellant's opportunity to successfully petition this Court for review?

QUESTION 3

Does an appellate opinion or appellate order that without comment affirms summary judgments fail, by its absence of explanation for the rulings, to meet the *de novo* standard of review of summary judgments?

QUESTION 4

Does application of the "clear error" standard of appellate review of a bench verdict require that the appellant show clear error concerning the ultimate judgment itself, or is the appellant entitled to a new trial upon a showing of clear

error throughout the judge's summary of the evidence upon which the judge states the verdict is based?

QUESTION 5

Are district judges in their Findings of Fact and Conclusions of Law that resolve bench trials required to provide a reasonably accurate summary of the trial record and base their trial verdicts upon the actual evidence in the trial record?

QUESTION 6

Is a district judge entitled to base a bench verdict upon evidence that exists nowhere in the record of the case (or anywhere else) and upon a defense that the defendants expressly had waived in order to exclude from the record the defendant's deposition testimony that explicitly contradicted that earlier-proffered defense?

QUESTION 7

Are district judges entitled in their Findings of Fact and Conclusions of Law that resolve bench trials to fail to acknowledge admissions in the trial record by the losing party's opponent that explicitly contradict the judge's stated findings of fact?

QUESTION 8

Can a district judge prevent substantive appellate review of the actual evidence presented at trial simply by stating in his Findings of Fact and Conclusions of Law that the plaintiff presented no evidence to support her claims?

QUESTION 9

In a wrongful employment discharge lawsuit brought by a discharged government employee who alleges a violation of

her First Amendment right to free association, does testimony by the defendant who discharged the plaintiff that impeaches or retracts that defendant's proffered lawful reason for the discharge constitute evidence of unlawful motive for the discharge?

QUESTION 10

Can summary judgment properly be based upon a finding of fact by another court in an unrelated lawsuit when the losing party in the second lawsuit was not a party to the first lawsuit (and was unaware of the first lawsuit) and when no evidence of that purported fact exists in the record of the second lawsuit?

QUESTION 11

Can summary judgment properly be based upon a finding of fact never asserted by the winning party and cited sua sponte by the district court only in a memorandum opinion filed during the appellate process (upon remand ordering the district court to state its reasons for entry of summary judgment), thus affording the losing party no opportunity to introduce contrary evidence into the record?

QUESTION 12

Do federal constitutional and statutory civil rights laws that provide protections to employees exclude in-house government or private-sector attorneys from those protections by virtue of their status as attorneys?

QUESTION 13

Does the First Amendment's guarantee of free association to most government employees, as defined in Elrod v. Burns, 96 S.Ct. 2673 (1976), Branti v. Finkel, 100 S. Ct.

1287 (1980), and Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990), automatically exclude in-house government attorneys from that guarantee, irrespective of the nature of the attorney's job duties and the attorney's position within the hierarchy of that government's law department?

QUESTION 14

Is a party entitled to rely upon rules of law issued by this Court to prove a legal claim, or must a party present expert testimony to prove what this Court earlier found as a matter of law?

QUESTION 15

Can summary judgment properly be based upon a district court's de facto sua sponte motion made in a memorandum opinion filed during the appellate process (upon remand ordering the district court to state its reasons for entry of summary judgment), which states that a claim was insufficient because it lacked expert testimony to support it?

QUESTION 16

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QUESTION 17

In a lawsuit alleging unlawful sex discrimination in employment, is summary judgment in favor of the defendants permissible when the plaintiff's complaint states a *prima facie* case and the plaintiff submits as part of her response to the summary judgment motion transcripts of deposition testimony

in which the defendants impeach or retract each of their proffered lawful reasons for the discharge?

QUESTION 18

On counts for which a jury demand appropriately was filed, does summary judgment constitute a violation of the Seventh Amendment's guarantee of a right to jury trial when issues of material fact clearly exist and the district court's explanation for the summary judgments do not even address those factual contoversies?

QUESTION 19

In a lawsuit alleging unlawful sex discrimination in employment, is summary judgment in favor of the defendants permissible when the opinion granting the summary judgment fails to acknowledge and address most of the claimed bases for the discrimination claim?

QUESTION 20

Does the blacklisting from employment elsewhere of a former government employee by officials of that government constitute an unconstitutional violation of due process of law?

QUESTION 21

Is a party to a lawsuit in federal court entitled in her appellate briefs and in a letter to that court pursuant to 28 U.S.C. 372 to challenge the integrity and motive of the district judge without effectively waiving her right to consideration of her substantive grounds for appeal?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, BEVERLY B. MANN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on January 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been reported.

The opinions of the United States District Court for the Northern District of Illinois have not been reported.

STATEMENT OF JURISDICTION

Original subject matter jurisdiction before the United States District Court was based upon federal questions presented under the First and Fourteenth Amendments to the Constitution of the United States, Title 42 of the United States Code, Sections 1983 and 2000e, and Federal Rule of Civil Procedure 18(a). Jurisdiction was conferred under Title 28 of the United States Code, Sections 1331 and 1343.

The district court entered a final judgment on February 10, 1992. Petitioner timely appealed this case to the Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. section 1291. On January 19, 1996, the Court of Appeals filed an unreported Order resolving the issues raised on appeal.

Petitioner filed a timely petition for rehearing to the Court of Appeals. That petition was denied on March 19, 1996.

On May 31, 1996, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including August 16, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(l).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

> himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Beverly B. Mann was discharged from her position as an assistant corporation counsel for the City of Chicago in the fall of 1984, one and one-half years after the inauguration of Chicago Mayor Harold Washington. She had been hired for the position five years earlier directly by former Chicago Mayor Jane Byrne, with whom she had a family connection. Washington had defeated Byrne in the mayoral primary election of 1983. Mann and some of her family members had actively supported Byrne during the campaign.

During all but Mann's first week of employment with the City of Chicago, she was assigned to the Torts Division of the City's Law Department. Her job duties consisted solely of defending the City and its employees in personal injury and, occasionally, civil rights matters. Her job category throughout her employment there was non-supervisory and was included among those protected by a federal court decree known as the *Shakman* consent decree, which

in relevant part confers upon persons holding certain specified employment positions within the City of Chicago's government explicit protection from discharge for politically related motive.

The *Shakman* consent decree resolved a lawsuit brought in the early 1970s not by City employees but by a few persons running for political office against local Democratic "machine" candidates. The plaintiffs in that lawsuit claimed that the local patronage system created a patronage army that almost necessarily resulted in the election of the machine's candidates. [See *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315 (N.D. Ill. 1979)]

Immediately upon assuming office in April, 1983, Mayor Washington appointed respondent James Montgomery, his friend and one-time legal counsel, as the City's corporation counsel. Montgomery acknowledged in deposition and trial testimony in this lawsuit that Mann's job duties were unrelated to politics or policymaking and that political affiliation was irrelevant to competent performance of the job. He had, in fact, immediately upon assuming office completed the negotiation of the pertinent portion of the *Shakman* decree, which was intended to mirror the dictates of *Elrod v. Burns* 96 S.Ct. 2673 (1976), and *Branti v. Finkel*, 100 S.Ct. 1287 (1980); the inclusion of Mann's job category as among those protected by the decree therefore served as further such acknowledgment by him.

Montgomery also acknowledged in deposition and trial testimony that as corporation counsel he did not object to the patronage system in hiring attorneys for the City's Law Department, provided that the attorneys hired were qualified for the job. He also acknowledged, again in deposition and trial testimony, that he made the following statement to reporter Douglas Franz, then of *The Chicago Tribune*, as reported in that newspaper in May, 1985:

> You engage people who are known to you, whose confidence is known to you. I don't know that it would really be a wise thing for any politician to hire people who are not in any way aligned politically to him. That would be suicide.

Montgomery also testified that a draft speech titled *Patronage and Political Dismissals* was written in his name and at

his direction in late 1984 by an attorney working under him in the Labor and Personnel Division of the Law Department and acknowledged that it contained the following passage:

> As a practical matter, a public employer should never admit to discharging an employee solely for his or her political beliefs and should advise supervisors to keep quiet.

The passage appeared in a section titled Strategy for a Public Employer Where an Employee Alleges His or Her Discharge Infringed First Amendment Freedom of Association and Speech. The speech was to be presented at a meeting of the National Association of Municipal Lawyers. Montgomery testified that he did not actually give the speech, having become ill with the flu the day before. He sent an assistant to speak in his place. Montgomery testified that he never read the speech drafted for him.

During Mann's entire tenure in the Torts Division, her immediate supervisor was respondent Timothy O'Hara, whose title was Chief Assistant Corporation Counsel in Charge of Torts. Mann and O'Hara had had a somewhat tumultuous relationship throughout Mann's employment in the Torts Division. O'Hara would provoke her into submitting her resignation or submitting a divisional transfer request and then, as he admitted in testimony, prevail upon her to withdraw her resignation or transfer request.

Shortly into Montgomery's tenure as corporation counsel, he hired respondent Jayne Barnard, a Harold Washington supporter during the recent campaign and the wife of a friend of Montgomery's, as his deputy corporation counsel in charge of Law Department personnel. Barnard was charged immediately with hiring attorneys for the Law Department, although a hostile City Counsel would not provide funding for additional attorneys. Barnard nonetheless began in September, 1983 to interview job candidates -- for non-existent job openings.

In early 1984, the City Counsel did approve funding for more attorneys but, because of space limitations in the Torts Division, Barnard could not place new attorneys there. She acknowledged in testimony that she hired several attorneys during the early months of 1984 with the promise that they would be assigned to the Torts Division, the division they had requested,

when openings became available in that division. In late June, 1984, the Torts Division moved to larger quarters and Barnard transferred as many of the recently hired attorneys into the Torts Division as space permitted. Space did not permit all of the attorneys hired with the promise of assignment to the Tort Division to transfer into that division, however.

Immediately upon assuming her job duties in August, 1983, Barnard at Montgomery's request created a job performance evaluation system by which the division heads would submit written evaluations of the attorneys they supervised. She instructed the division heads on how to perform the evaluations. Montgomery, for his part, informed the division heads that he expected some low evaluations.

The evaluation system provided for no formal mechanism by which the evaluated attorneys could challenge the evaluations, in whole or in part.

The first set of job performance evaluations was written in September, 1983. Among the chiefs of the approximately ten Law Department divisions, only one, Timothy O'Hara, acceded initially to Montgomery's expressed expectation that he would be provided with some low job performance evaluations for subordinate attorneys. Montgomery acknowledged in testimony that he ordered one of the other division heads to rewrite the evaluation of a particular subordinate attorney to lower the evaluation, and told the division head that he would be fired if he did not accede to the demand.

O'Hara selected Mann as one of four attorneys to trash in the evaluations, rating her as essentially incompetent in both sets of categories: "job duties" and "personal characteristics." On a scale of "1" to "5", "5" representing "excellent," he rated Mann a "2' in the "trial" category, for example. he failed to rate her at all in some important categories, such as "writing." In the short space provided for narrative comment, he wrote:

> Attractive, very intelligent attorney. Seems to have missed out on one step - (Can't put my finger on what it is). Wants to succeed but won't take the hard risks? Should be able to effectively help our office. Takes good depositions.

Mann's trial record, however, did not correspond accurately to the rating; she had tried six cases to jury verdict and had obtained a "not guilty" verdict for the City in four of them and a judgment below the final pretrial demand in the other two. Nor did O'Hara's other ratings correspond accurately to Mann's easily verifiable job performance record.

She protested to O'Hara, who responded that he thought she was very attractive. He also told her that Barnard had assured him that this evaluation period was just a trial run and "will not be used for anything." There would be another evaluation in March, he said, and his evaluation of her then would be better.

Mann complained to Barnard, at first orally and then in writing. Mann's written complaint, in a letter dated October 21, 1983, told Barnard (as did Mann's earlier oral complaint) that there was no correlation between O'Hara's evaluations and the verifiable performance record of the attorneys he evaluated. Orally, as Barnard acknowledged in testimony, Mann told Barnard of O'Hara's repeated harassment of her. Barnard placed Mann's letter in her personnel file, but submitted O'Hara's evaluation to Montgomery with written comments indicating acceptance of them as accurate. She admitted in testimony that she made no attempt to verify their accuracy and did not know whether or not they were accurate.

In January, 1984, ostensibly on the basis of that evaluation, Mann was demoted and was relieved of her trial caseload. On June 1, 1984, she was denied a pay raise given to the other Torts Division attorneys. O'Hara testified that he had recommended the denial of the pay raise to Mann.

In late July, 1984, Barnard initiated the long-delayed second round of Law Department job performance evaluations. This time, O'Hara rated Mann competent in the "job duties" categories in which he rated her at all. Again, he failed to rate her in some obviously pertinent categories, and again he trashed her in the "personal characteristics" categories. In answer to a question on the evaluation form concerning whether the attorney being evaluated was "ready to be assigned more difficult and challenging matters,"

O'Hara said Mann was not ready because she "is too hung up on defending herself."

In the space provided for narrative comment, he wrote:

> Attorney is bright. A good legal mind. Unfortunately she spends more time on her accomplishments to the detriment of her assigned work.

Montgomery and Barnard testified that when O'Hara submitted his performance evaluation of Mann, O'Hara recommended that Mann not receive a pay raise for the coming year.

On August 3, 1983, Montgomery decided to discharge Mann ostensibly because of the two evaluations. Mann learned informally of the decision and asked to meet with him. He agreed. Mann repeated most of what she earlier had told Barnard about her relationship with O'Hara, his harassment of her, her verifiable job performance record. She also handed him a five-page, typed, single-spaced summary of her job performance record, most of it verifiable. Montgomery agreed to read it.

A few days later, Montgomery, Mann and O'Hara met briefly. At the meeting, O'Hara praised Mann's job performance. Montgomery hinted that he would not discharge her. One month later, on September 6, 1984, Barnard told Mann that Montgomery had decided to fire her and that she must evacuate her office by the end of that day. Mann asked for an explanation. Barnard said she would not provide one. Mann asked to meet with Montgomery, who refused to meet with her.

Barnard ordered her secretary to type on Mann's Exit Interview report that Mann was "involuntarily terminated" for "Inadequate performance of duties." Barnard testified that the statement was inaccurate and that Mann did not perform her duties inadequately.

Montgomery acknowledged in deposition and trial testimony that he "was aware" that O'Hara's performance evaluations of Mann were "not as candid as they could have been" and that Mann "had good reason to bitch" about O'Hara's "treatment of her."

He testified that he discharged her nonetheless because she had complained to him about the evaluations. Having given that

testimony initially in his deposition, he acknowledged the statement at trial but said he meant that Mann was complaining to him that O'Hara's evaluations of her were too high, not too low. The following exchange ensued on cross-examination:

> Q. Would you explain to me, Mr. Montgomery, why your view that some of the evaluations were too high would give Beverly Mann good reason to bitch, as you put it, about her treatment?
>
> A. I can't explain -- I can't answer that question.

Moments earlier, Montgomery had conceded that he recognized that Mann was complaining not that her evaluations were too high but that they were too low.

Montgomery also stated that he fired Mann because a judge had complained to him about her conduct in a trial several years earlier, which the judge said caused the Torts Division to routinely file petitions for change of judicial venue (as allowed by Illinois procedural law) on cases assigned to that judge. Montgomery conceded, however, that O'Hara had told him that several other Torts Division attorneys had had serious difficulty with that judge and that he, Montgomery, was aware of the judge's reputation among Chicago lawyers for mental instability. Montgomery also conceded that as a litigator he himself had had serious difficulty with judges on occasion.

As for O'Hara, in both his deposition and trial testimony he praised Mann's job performance, describing it in one category after another as "excellent," "very good," "better than average," and the like. He offered two reasons for his submission of the poor job performance evaluations of her. He said he thought Mann was afraid, or at least too hesitant, to try cases. He also said that some judges had complained to him that Mann was "too aggressive," "too pushy," in her manner in court.

Immediately after she was discharged, Mann retained counsel, who negotiated an agreement by which Montgomery would provide her with a detailed letter of recommendation and personally respond to all inquiries about her from prospective employers. Her personnel file would indicate that the letter of

recommendation supersedes the two performance evaluations. In exchange, Mann would not file a lawsuit relating to her discharge.

Barnard drafted the detailed letter of recommendation, which praised Mann's job performance. Barnard testified in her deposition that the statements in the letter were "factually" accurate. Montgomery signed the letter but did not comply with the provision that he himself respond to inquiries about Mann; he assigned that task to Barnard, who made derogatory comments about Mann to a prospective employer. Mann learned of the incident, suspected that there had been similar incidents, and filed this lawsuit.

The operative complaint alleges violation of the *Shakman* consent decree, the First Amendment right to free association, denial by virtue of sex discrimination of the Fifth Amendment guarantee of equal protection of the law, violation of 42 USC 2000(e) *et seq.*, defamation, tortious interference with prospective economic advantage and breach of severance agreement.

One month before trial, the district court entered summary judgment in favor of the respondents on all federal counts except the one alleging violation of the *Shakman* decree. The court provided no explanation for its rulings, although Seventh Circuit Rule 10 required an explanation.

The case was tried to a jury on the state-law counts alleging defamation, tortious interference with prospective economic advantage and breach of severance agreement, and to the bench on the *Shakman* decree count..

A jury verdict was entered in favor of Mann on the count alleging tortious interference with her job as a City assistant corporation counsel and on the count alleging breach of severance agreement. A jury verdict was entered in favor of the respondents on the other state-law counts. The district judge entered a judgment in favor of the respondents in the *Shakman* decree count and filed a *Findings of Fact and Conclusions of Law* as explanation. [See Appendix at 13a.]

The six-page Findings of Fact and Conclusions of Law mentions almost none of the evidence that Mann recites in the above paragraphs in this petition, notwithstanding that most of

that evidence consisted of direct and directly pertinent admissions by the respondents.

Moreover, two of the purported statements of fact that the court claimed as grounds for its verdict were not alleged by the respondents and no evidence exists in the trial record to support those findings of fact.

One such claim was that Mann's father met with former Mayor Byrne's corporation counsel, Stanley Garber, to arrange a pay raise for Mann that O'Hara had denied her in January, 1983, shortly before the primary election. The court viewed that as evidence that Mann was incompetent in her job. Neither Mann's father nor Garber was a witness at trial (or in deposition) and no one else testified to having heard such a conversation. (No such conversation had occurred.)

Mann testified that O'Hara had obtained that pay raise for Mann after she submitted her resignation, in exchange for her agreement to withdraw her resignation. The district court's *Findings* do not acknowledge the existence of that testimony nor O'Hara's testimony that he had on several occasions persuaded Mann to withdraw a resignation or transfer request she had submitted.

The other claim was that Montgomery discharged Mann because she did not want to try enough cases. Montgomery in his deposition testimony had directly contradicted that finding, stating that he agreed with Mann's position and disagreed with O'Hara's. The court barred Mann from introducing that testimony into the trial record, though, because the respondents expressly waived that defense; the court ruled that the deposition testimony was irrelevant in light of the waiver. Mann includes in her appendix the seventeen pages of trial record in which this was discussed. [See Appendix at 30a.]

The district court's representation that Mann tried only two or three cases to jury verdict also is inaccurate; Mann tried six cases to verdict. The district court does acknowledge that the City prevailed in the cases that Mann tried to verdict.

The district court stated in its *Findings* that no evidence existed to support Mann's claim and that a great deal of evidence

existed to suggest that Montgomery discharged Mann in order to upgrade the quality of the Law Department to that of a high-quality law firm and because he wanted to dismantle the patronage system.

Mann appealed from the summary judgments, the bench verdict and the jury verdicts in the respondents' favor. She challenged the jury verdicts on the basis of an instruction to the jury that defined the term "actual malice." The respondents appealed from the two jury verdicts in Mann's favor, also challenging a jury instruction.

The Court of Appeals, as per its Circuit Rule 10, remanded the case to the district judge for his statement of his reasons for granting the respective summary judgments.[See Appendix at 19a.] The judge offered two grounds for his summary judgment on the Free Association claim.

One of them was that the Sixth Circuit, in *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990), had held that the chief corporation counsel of the City of River Rouge, Michigan (population 11, 314, according to the 1990 U.S. Government census), was not entitled to First Amendment free association protection in his job, and therefore Mann was not entitled to such protection. On appeal, Mann noted that the single basis that the court in *Williams* cited for its ruling was that the plaintiff was the chief legal officer for the City, who in accordance with that City's ordinance, was formally nominated for the job by the mayor for a specific term length, and whose nomination was confirmed by the city counsel, and whose job duties concerned the formulation of government policy, and who had direct regular contact with the mayor.

The plaintiff in Williams, in other words, was in a position that corresponded directly to Montgomery's, not to Mann's. Not a single factual circumstance cited by the court in *Williams* as a basis for its ruling was present in Mann's case.

The district judge's other justification for entry of that summary judgment was ***a lengthy and detailed series of findings of fact by another court in an unrelated matter in which the City of Chicago was a party but in which Mann was not.*** The opinion is *Salaried Employees of North America (SENA) v. Illinois Local*

Labor Relations Board, 202 Ill. App.3d 1013 (1990). ***The district court in Mann's case adopted as fact three paragraphs from the SENA opinion that purport to detail the job duties of City of Chicago assistant corporation counsel. Neither Mann nor any other Torts Division attorney during Mann's five-year tenure there ever was assigned any of those job duties, nor are those job duties related to the work that the Torts Division performed.***

The district court justified its adoption of the description in *SENA* by adopting, in turn, another SENA finding of fact that is utterly lacking in support in the evidentiary record of Mann's case and is utterly false. That finding: that the City of Chicago Law Department in the late 1980s was structured so that staff attorneys routinely rotated laterally from one division to another within the department on a daily basis. Irrespective of the relevance (or lack of it) of such a fact to the issue in Mann's case, ***Mann's respondents had never alleged any such fact nor did any such evidence exist in the record of this case. The alleged fact is erroneous***, at least with respect to the early 1980s, the time period relevant to this case, and Mann easily could have proved this had she been afforded the opportunity.

The court, in other words, entered summary judgment partly on a *sua sponte* factual claim for which no evidence exists in the record of this lawsuit and that Mann never was given the opportunity to address. Unlike the opinion in *Williams* and in every other federal court opinion concerning the issues addressed by this Court in *Elrod, supra.*, and *Branti, supra.*, the statement by this district judge contains no analysis of Mann's job duties other than its adoption of the finding of fact in *SENA*. The judge's statement mentions neither Montgomery's testimony that political affiliation was irrelevant to Mann's job duties nor the inclusion of Mann's job category as among those protected in the *Shakman* decree.

Although the Court of Appeals in Mann's case adopted without explanation the *Williams* court's result, it did not adopt the *Williams* court's recognition that *Elrod* and *Branti* require a thorough stated analysis by the court of the plaintiff's actual job duties, and that the simple mention of the fact that the plaintiff was an attorney does not constitute such an analysis.

The Sixth Circuit Court of Appeals considered the *Williams* plaintiff's claim of Free Association protection sufficiently plausible in light of the factual circumstances in that case to warrant a detailed analysis by that court and a detailed explanation for its ruling, notwithstanding that that plaintiff was the top legal officer for the respondent City and that his job duties required participation in policymaking and regular contact with the mayor. The Seventh Circuit Court of Appeals, on the other hand, professed to find Mann's job position -- a low-level non-policymaking position as a tort defense attorney, entailing no contact with the mayor -- so clearly lacking in Free Association protection that her claim warranted no visible analysis and no explanation for the court's decision to affirm the summary judgment.

Because Mann's job position was the lowest level position for attorneys in the City's Law Department, because her job position entailed no contact with the mayor, because she was a tort defense litigator and therefore was not involved in politically-related matters, because her low level position was in one of the largest municipal law offices in the country, the court's ruling as a matter of law that Mann was not entitled to Free Association protection constitutes a ruling that no government attorney, or at least no municipal government attorney, is entitled to that protection. It is unlikely that a position as a government attorney exists anywhere in the country with job duties less related to political affiliation than the one at issue here.

On the gender-motive counts, the judge stated as his grounds for summary judgment that the criticism of aggressiveness about a woman in a traditionally male job is gender-neutral and that Mann had failed to establish with expert testimony by a social psychologist in her response to the summary judgment motion that aggressiveness is associated in American society with masculinity. The defendants' summary judgment motion did not argue that a complaint of aggressiveness in a woman is gender-neutral, and inasmuch as this Court had held this as a matter of law in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), Mann was unaware that it remained an issue.

The judge also simply dismissed the evidence regarding O'Hara's specific treatment of Mann as she describes it above. In commenting upon Mann's claim that Montgomery considered the comments that she "was too pushy or aggressive and lacked humility in determining to terminate her," the judge said:

> There was nothing wrong in defendant Montgomery s considering plaintiff's having poor interpersonal skills, see Price Waterhouse v Hopkins, 490 US 228, 236, 109 S Ct 1775, 1783 (1989), and there was no evidence that he would have considered the same traits as positive or even neutral in a male employee. There was, in short, no direct evidence of sex discrimination in the decision to terminate plaintiff.

The judge, in other words, disagrees with the ruling in Price Waterhouse and openly mocked it, citing it as authority for his proposition that, as a matter of law, criticism of a woman as too aggressive a litigator is gender-neutral and constitutes evidence of poor interpersonal skills.

The Court of Appeals, in turn, affirmed this, but carefully avoided making the rule of law in any case but this one.

The district judge further stated -- as a matter of law --, that Montgomery thought Mann was complaining to him that O'Hara's evaluations of her were too high; because they were too high, Mann had "good reason to bitch" to Montgomery about them.

Montgomery, as noted above, testified that he could not explain why he thought Mann was complaining to him that her evaluations were too high. The judge, who apparently ***could*** explain this, chose not to do so.

In violation of Mann's Seventh Amendment right to a jury trial on her Equal Protection count, the judge ruled as a matter of law that the defendants were entitled to summary judgment because:

> Based upon defendant O'Hara's 1983 and 1984 evaluations, defendant Montgomery concluded that plaintiff's poor job performance justified terminating her.

Heavily featured in Mann's response to the summary judgment motion was O'Hara's own deposition testimony to the contrary, as well as Montgomery's statements of acknowledgment that the evaluations were inaccurate and that he believed Mann had good reason to bitch about them.

The district judge states repeatedly in his memorandum opinion that he granted the summary judgments on the basis of what he terms "the evidence that defendant Montgomery believed plaintiff's job performance was poor." The judge cites to no such evidence, though; he cites only to Montgomery's bare conclusory statement, hardly a sufficient legal foundation upon which to deny a jury trial.

During the appellate process -- in her Reply brief and in a response to a motion, and later in a letter of complaint to the chief circuit judge -- Mann raised the issue of judicial impropriety on the part of the final district judge and an earlier one.

The judge assigned to the case initially, in December, 1984, had a close family relationship with respondent Jayne Barnard. Federal Rule of Civil Procedure 455 mandated his recusal, yet he retained the case for nearly four years, repeatedly ordering the respondents' counsel to file dispositive motions and the like. He removed himself from the case shortly after this Court issued its opinion in *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988), which reinforced that Rule 455 requires rather than merely suggests judicial recusal when a conflict of interest exists.

The judge next assigned to the case expressed dismay at the respondents' counsel's expressed intent to file a summary judgment motion, stating unequivocally that he considered the case an inappropriate one for summary judgment. [See Appendix. at 49a.] In response to the defendants' counsel's statement that the defendants "intend to file a motion for summary judgment," the judge, Paul E. Plunkett, said, "What -- you know, I have read enough of this. What in heaven's name makes you think you could get summary judgment in this case? There are factual controversies all over it." He set a date for the filing of the pretrial order.

Shortly thereafter, the case was reassigned to a newly appointed judge, the judge who granted the summary judgments and wrote the two memorandum opinions that Mann describes above. During the trial before that judge, the respondents' counsel raised

the issue of the earlier judge's relationship to Barnard, asking Mann questions about it on cross-examination.

In the four years in which the case was assigned to the initial judge, James B. Moran, eight new caseloads were created from existing ones, seven for newly appointed judges and one for a judge returning after a lengthy illness. Yet the case remained with Judge Moran. As Mann noted in her various statements of complaint, including in her Reply brief on appeal, the case was available for judicial reassignment nine times. The first eight times, when the case was before Judge Moran, it was not reassigned. The ninth time, when it was before the judge who stated that summary judgment was inappropriate, it ***was*** reassigned.

The lottery result, in other words, favored the respondents all nine times. In her Reply brief, Mann commented that she congratulated the defendants on their remarkable luck of the draw and suggested that they try their luck in Las Vegas.

Mann includes her complaint letters as part of her Appendix at 51a through 65a. All are part of the formal record below. The letter of complaint to the circuit executive was submitted in accordance with 28 USC 372(c) (3) (A). [See Appendix at 51a.] That letter, which Mann included as part of her *Petition for Rehearing with Suggestion for Rehearing En Banc*, details the relationship between Barnard and Judge Moran, and Judge Moran's conduct in the case. Mann also includes in her Appendix at 69a the memorandum of response she received, which states that her complaint was time-barred and that, in any event, the substance of it was not an appropriate matter for a misconduct complaint.

Also now a part of the record below, Mann having included it as part of her *Petition for Rehearing with Suggestion for Rehearing En Banc*, is a copy of four-page book proposal/query letter Mann drafted and sent to literary agents in early 1994 during the interminable appellate process in this case, and a copy of her contract with a literary agent regarding her proposed book. The proposal is for a book detailing the court's handling of Mann's lawsuit, and the reasons for that manner of handling, as evidence of the current state of federal judicial conduct in civil litigation.

Mann argues in her proposal letter that federal judges routinely nullify, by a variety of means, laws they do not like and use their authority to serve their personal or ideological interests. Mann includes that letter and the literary agent's contract regarding that book proposal in her Appendix at 71a and 77a, respectively, and makes the arguments in the proposal letter a part of this petition.

Mann also notes that although technically represented by counsel on appeal, she was *de facto* (for financial reasons) essentially a *pro se* appellant, having herself drafted most of her opening brief and all of her Reply brief, facts known to the court via motions and responses during the appellate process. Mann also orally argued the appeal before the assigned panel. She considers this noteworthy because it became clear during oral argument that none of the panel members had read her briefs and all three were poorly informed about the evidentiary record and about the arguments in those briefs.

Mann includes in her Appendix at 79a an article she submitted to *The Chicago Daily Law Bulletin* that that journal published on December 8, 1994, which argues that federal judges commonly determine matters before them on the basis of the relative social status of the litigants and their respective counsel. She adopts the arguments in that article as part of this petition.

The case initially was assigned to an appellate panel comprised of Judges Joel Flaum, Kenneth Ripple and Ilana Rovner. Before oral argument, Judge William Bauer replaced Judge Flaum.[1] Mann presumed then that Judge Flaum had recused himself because of a conflict of interest. Yet he participated in the ruling on Mann's *Petition for Rehearing with Suggestion for Rehearing En Banc*, presumably an indication that he had no conflict of interest when he withdrew as a member of the panel. Mann considers this pertinent to this petition because of the peculiar history that Judge William

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[1] The Seventh Circuit Court of Appeals does not announce the panel makeup until the morning of oral argument. It does, however, assign all cases heard on the same day in the same courtroom to the same panel. All of the other cases argued that day in that courtroom were heard by Judges Flaum, Ripple and Rovner.

Bauer brought to his participation in this matter. In an opinion he authored in 1987, he wrote:

> Although ADEA prohibits employers from discriminating against employees based on age, in this case Commercial was more than Kier's employer. Kier was Commercial's attorney and Commercial was Kier's client; nothing in this opinion should be read to limit the clear right of a client to discharge his or her attorney for any reason, or for no reason. This principle reflects an understanding that the relationship between attorney and client is based on trust and cannot function unless the client has complete confidence in his or her attorney. However, although defendant submitted a jury instruction on this issue, it did not press any objection to the district court's failure to instruct on the issue. Nor did Commercial submit any memoranda of law in support of its assertion, presented for the first time below as a jury instruction, that an in-house attorney should be treated the same as a non-employee attorney for the purpose of the discharge. More importantly, the defendant did not present this issue on appeal. Accordingly, we deem the argument waived. *Kier v. Commercial Union Ins. Companies*, 808 F.2d 1254, 1256-57.

Judge Bauer over the years has participated in rulings in a number of wrongful employment discharge lawsuits brought by in-house counsel for corporations, governments or insurance carriers. To Mann's knowledge, he has never voted in favor of the attorney-plaintiff, although he has never cited this exemption theory as a basis in any other case. The respondents in Mann's case never raised such an issue, but, in light of Judge Bauer's participation, they did not have to.

Judge Bauer, incidentally, was a member of the motion panel that remanded this case to the district judge for his statement of reasons for his summary judgments, so he was aware of the case before it was assigned to a merits panel.

The Court of Appeals on January 19, 1996 resolved the cross-appeals in this matter by issuing an Order pursuant to its

Circuit Rule 53, which provides for the resolution of appeals in certain circumstances by court order applicable only to the case being resolved rather than by published opinion. The court's order in this case reversed and remanded the case for retrial on two of the state-law counts, adopting the respective arguments challenging the two jury instructions at issue. It affirmed, ***without comment,*** all the other ***judgments*** entered in the case.

Although issued nine and one-half months after oral argument, and although Circuit Rule 53 expressly requires that such an Order ***"contain reasons for the judgment"*** unless "the court has announced its decision and reasons from the bench," the Order entered in this appeal affirmed without comment the summary judgments on all of Mann's civil rights counts and on the bench verdict in the Shakman decree count. [Emphasis added.] The court had announced nothing from the bench.

Mann filed her *Petition for Rehearing with Suggestion for Rehearing En Banc* on February 2, 1996. Six and one-half weeks later, triple the usual length of time for such rulings by that court, her petition was denied. The denial order stated that no judge voted to hear the matter *en banc.*

REASONS FOR GRANTING THE WRIT

I. SEVENTH CIRCUIT RULE 53 AS APPLIED IN THIS MATTER CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW AND A FAILURE TO COMPLY WITH THE DE NOVO STANDARD OF APPELLATE REVIEW OF SUMMARY JUDGMENTS

Seventh Circuit Rule 53 states in relevant part:

(c) *Guidelines for Method of Disposition.*

(1) *Published opinions.*

A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of the law,

(B) by describing legislative history,

(C) by resolving or creating a conflict of law;

...

(2) *Unpublished orders.*

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

The district court's memorandum opinion stating its reasons for its entry of the summary judgments, as affirmed on appeal, establishes one after another new or altered rule of law, although the invocation by the Court of Appeals of its Rule 53 establishes those rules of law only in Petitioner's case. Via Rule 53, the pertinent rules of law (and the absence of such) that existed before the Order was entered in Petitioner's case will apply to all further such cases, at least until further notice.

Before entry of that Order, no rule of law existed holding that in-house government attorneys by virtue of their position as attorneys lack entitlement to First Amendment protections irrespective of the nature of their actual job duties. No such rule of law exists after entry of that Order either. Yet the court necessarily invoked such a rule of law to affirm without comment the summary judgment on Petitioner's First Amendment count.

No rule of law existed before, or exists after, the entry of that Order that holds that findings of fact in another lawsuit can determine a finding of fact against a party in another lawsuit although that party was not involved in the earlier lawsuit. Much less did, and does, a rule of law exist permitting such a factual determination *sua sponte* without prior notice to the losing party and without affording that party an opportunity to address the factual issue. Yet the court quietly invoked such a rule of law to

affirm without comment the summary judgment on Petitioner's First Amendment count.

No rule of law existed, or exists, that holds that a decision to discharge a woman from her traditional male job because of criticism that she was too aggressive in performing that job does not constitute evidence of unlawful sex discrimination. To the contrary, the law before and after the entry of that Order explicitly states that it does; this court's opinion in *Price Waterhouse* was at the time of entry of this Order the law, and remains so. Yet the court failed to comply with that rule of law when it affirmed without comment the summary judgments on both of Petitioner's counts alleging unlawful sex-based motive.

Nor did, or does, the law require plaintiffs to reestablish via expert testimony an established rule of law. Yet the court held otherwise in affirming without comment the summary judgments entered in Petitioner's gender-related counts partially on the basis that Petitioner had not reestablished that criticism of a women's job performance as too aggressive is a gender-specific criticism.

To Petitioner's knowledge, no rule of law existed or exists that holds that a bench verdict can be based virtually entirely upon a phantom evidentiary record. Yet the court invoked such a rule of law to affirm without comment the summary judgment on Petitioner's *Shakman* decree count.

In preparing to draft this petition, Mann, who had never seen much less drafted a certiorari petition, contacted a few attorneys who had drafted successful petitions and asked for copies of those petitions. One of the attorneys was Irwin Venick of Nashville, Tennessee, the petitioner's counsel in *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). When Mann received the copy of the petition filed in that case, she was struck by the indication that that case, like her own, was appealed to this Court from an unpublished Order, pursuant to a Sixth Circuit rule similar to the Seventh Circuit's Rule 53.

The question presented to this Court in that petition read:

> Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial court has found that she

was offended by conduct that would have offended a reasonable victim in the position of the plaintiff?

Petitioner makes no comment on the merits of the written statement and the ruling by that court from which that plaintiff petitioned this Court for review. She suspects, though, that that court's determination of that issue in *Harris* hardly reflected settled law, nationwide or even in that circuit. ***It appears then that federal courts of appeals perceive circuit rules such as Seventh Circuit Rule 53 as authorizing the unequal application of the law upon the whim of the assigned judicial panel and as authorizing the repeated application of de facto but undeclared rules of law.***

This use of that Rule in Petitioner's case was not an aberration.

What ***is*** an aberration, though, is the court's decision in Petitioner's case to disregard the requirement in its own Rule 53 that "[t]he order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench."

Or even if it has not, when that court wishes to rule in a particular case, and only in that case, contrary to established law or contrary to what it believes this Court would allow.

Petitioner has researched the matter as best she could and has queried several federal court litigators in Chicago, and has learned of no case in which judgments were affirmed on appeal without a statement, even if brief, of the court's reasons for its rulings. It seems clear to Petitioner and others that the court failed to provide any explanation for its decision to affirm those judgments because it was aware that the reasons provided by the district court were improper and no other legitimate justification could be found.

The court circled the wagons around its lower-court colleagues whose conduct in this matter Petitioner severely criticized, including in her Reply brief. The defensive tone of voice in the questioning of her at oral argument by one of the panel members, Judge Ilana Rovner, suggested that Judge Rovner was made aware of Petitioner's allegations even without having been made aware of most of the remainder of the contents of Petitioner's briefs.

Irrespective of the accuracy of Petitioner's presumption concerning judicial motive by the Court of Appeals, ***circuit rules such as the Seventh Circuit's Rule 53 constitute an unconstitutional denial of due process of the law when used to circumvent the very concept of the rule of law.*** Rule 53 itself appears to acknowledge this; as indicated above, it states that "[a] published opinion will be filed when the decision establishes a new, or changes an existing rule of law." Inasmuch as only published opinions ***can*** establish as precedent new, or changes in existing, law, the provision makes sense only if interpreted to ***require*** that new statements of law be published and thus become precedent. That is, the court lacked the authority, according to the Rule itself, to alter the law for only the case at issue.

The Court of Appeals, in other words, ignored the obvious dictate of the very rule it cited to effectuate its tactic.

Nor was that limitation to the Rule the only one that the court ignored. Also as indicated above, the Rule states that "[a] published opinion will be filed when the decision ... involves an issue of continuing public interest." It seems likely, in fact, that the court hid its rulings in this case precisely ***because*** it recognized that those rulings addressed issues of continuing public interest, and that if stated clearly and as precedent would generate controversy. A clearly stated ruling by a federal court of appeals that female litigators lawfully can be discharged from their employment for litigating too aggressively to suit the sensibilities of male judges, for example, likely would be noticed by the news media, and certainly by bar associations. A clearly stated ruling by the local federal court of appeals that in-house government attorneys necessarily lack First Amendment free association protection in their employment likely also would be noticed by the local news media and certainly by local bar associations.

If, as Petitioner suspects, the motivating factor for one of the appellate panel members in this case was his belief as expressed in *Kier v. Commercial Union Ins. Companies, supra.*, that in-house attorneys are not entitled to federal civil rights protections, constitutional or statutory, he is obligated to state this for the record. He lacks the legal authority to promulgate and enforce an

undeclared rule of law, a stealth rule of law, and thus avoid scrutiny of that law by the appellate court *en banc* or, more important, by this Court.

This stealth rule of law did become less stealthy in December, 1994, when the Seventh Circuit Court of Appeals adopted without analysis a modified version of the dictum comments made by Judge Bauer in *Kier*. The court in *Rand v. CF Industries*, 42 F.2d 1139 (7th Cir. 1994), piggy-backed on those comments, treating them as precedent, and therefore as not requiring analysis, notwithstanding their explicit identification in *Kier* as dictum. In doing so, the court in *Rand* altered the standard of proof and the application of Federal Rule of Evidence 403 in employment civil rights lawsuits brought by in-house corporate or government counsel.

The court wrote:

> Moreover, Rand was not just any employee. He held the unique and no doubt sensitive position of in-house counsel for CFI. Because he is one of CFI's attorneys, Rand's age discrimination claim implicates "the clear right of a client to discharge his or her attorney for any reason, or for no reason." *Kier v. Commercial Union Ins. Companies*, 808 F.2d 1254, 1256-57 (7th Cir. 1987). An attorney's age discrimination claim against his employer requires careful scrutiny because "the relationship between attorney and client is based on trust and cannot function unless the client has complete confidence in his or her attorney." *Id.* at 1257. For the same reasons, it is difficult to document dissatisfaction with an attorney's performance. Thus, CFI's decision to fire one of its attorneys must be given special deference. *Id.*

Though treated cavalierly by the court in *Rand*, this is hardly a trivial issue. Without specifically addressing the question, the *Rand* court simply presumes, as did Judge Bauer in *Kier*, that the client of in-house counsel is not the corporation or government that employs the attorney but rather the head of the corporation's or government's law department. That is a highly debatable presumption. The presumption results in the believe that the head of

a law department may decide, for example, to employ only white male attorneys to suit his personal preferences, notwithstanding that the real parties in interest -- the corporate shareholders or the government entity's residents -- may not as a group share these preferences.

The personnel makeup of corporate and government law departments have far-reaching implications regarding the corporation's or government's policies, and so more is at issue in this regard than simply employment opportunities for attorneys.

Equally important, this quiet, judicially created rule of law is promulgated upon a belief that federal courts of appeals are entitled to create exceptions to federal statutory civil rights protections on other than constitutional grounds. 42 USC sec. 2000e *et seq.*, after all, contains no statement exempting in-house counsel from its protections or altering the standard of proof by in-house counsel in such cases.

Additionally, there is the question of the *de novo* standard of judicial review of summary judgments and whether that requirement implicitly necessitates a stated explanation by the Court of Appeals of its rulings. The failure by the Court of Appeals to state any reasons for its rulings affirming the summary judgments in this case is itself a declaration of law: that litigants must accept on faith that the court has complied with its legal obligation to engage in meaningful review of those judgments.

Petitioner does not willingly accept on faith that this court did so in this matter. She asks this Court to hold that she is entitled to some evidence that the Court of Appeals did comply with that standard of review. ***Without such evidence, the stated standard of review is meaningless, or at least it is not mandatory; courts need not actually comply with it if they prefer not to do so.***

She asks this court also to recognize that the utter absence of any stated reason for the court's decision to affirm the district court's various judgments deprives the losing party of the right to meaningfully petition this Court for review, or even to meaningfully petition for *en banc* appellate review. Several of the district court's statements of law that the Court of Appeals affirmed in this case are credible candidates for review by this Court, Petitioner believes, but

her task of persuading this Court to address those issues is made so much more difficult because of the absence of a definitive statement of law by the Court of Appeals.

Petitioner states those issues at the beginning of this petition, in her list of questions presented for review.

A rule of law that permits courts of appeals to fail to state the reasons for their rulings empowers the appellate panels to help determine the outcome of petitions for review of their own decisions. Whether the petition seeks review by this Court or by the appellate court *en banc*, the obvious argument among the justices or judges against review in such circumstances is that the ruling has no precedential value and effects no other case.

II. THE AFFIRMATION OF A BENCH VERDICT THAT WAS BASED UPON OBVIOUSLY INACCURATE JUDICIAL REPRESENTATION OF THE EVIDENTIARY RECORD NEGATES THE VERY PURPOSE OF THE FACT-FINDING LITIGATION PROCESS AND ALTERS THE STANDARD OF PROOF

As stated above, Petitioner knows of no rule of law that holds that a bench verdict can be based virtually entirely upon a phantom evidentiary record. The civil litigation process, particularly in federal court, is governed by elaborate rules of discovery and of admission of evidence. The purpose for these rules presumably is to increase the likelihood that the outcome of litigation will reflect the actual relevant facts, the evidence, upon which the litigation is based.

In this case, Petitioner engaged in a lengthy, expensive and emotionally grueling process of discovery, of gathering the evidence to prove her assertions. As the above statement of the case suggests, her case rested very largely upon express and highly pertinent admissions by the respondents.

The district court in this case in its Findings of Fact and Conclusions of Law on the *Shakman* decree bench count brazenly tossed out the evidentiary record and supplanted it with an evidentiary record of his own. He pretended that the respondents'

various admissions presented at trial were never made. He barred Petitioner from presenting admission testimony by one of the respondents and then purported to find directly to the contrary of the barred admission. He fabricated an account of an incident that had not occurred. He drew affirmative conclusions of fact that contradicted the respondents' own testimony.

In doing so, he altered the nature of the trial from a fact-finding mission to an exercise in the perversion of truth. To a mockery. To a staged show. To a farce. The evidence painstakingly gathered during the preceding nearly seven years meant nothing because it did not comport with the judge's predetermination.

Had the evidence supported the judge's predetermined outcome, his *Findings of Fact and Conclusions of Law* surely would have veritably teemed with pertinent evidentiary detail.

And so would the opinion of the Court of Appeals, as its opinions routinely do in explaining its rulings in employment-related and other fact-based controversies.

Instead, the Court of Appeals affirmed without comment the district court's affirmative conclusions though utterly unsupported by logical explanation. In doing so, it removed the requirement of correlation between evidence and result, of correlation between the evidentiary record and the representation of that record by the court. It cavalierly destroyed, in turn, the legitimacy of the federal civil justice system, at least in Petitioner's view. It affirmed the suspicion that she and many others familiar with federal court practice have held: that, in federal court, truth is subject to revision at the whim of the assigned judge.

The respondents are treating the appellate affirmation of the district court's judgment in the Shakman decree count tried to the bench as a finding by the Court of Appeals that the affirmative representations of findings of fact by the district judge are accurate. The issues in the state-law counts that were remanded for retrial correspond to the conclusory representations of fact in the district court's *Findings of Fact and Conclusions of Law*, and the respondents recently filed a motion seeking to reopen discovery on the grounds that the appellate affirmance of those professed findings of fact necessarily mean that the representations are accurate. [See

Appendix at 80a.] A summary judgment motion on this ground likely will follow, notwithstanding the extensive case authority that holds that judicial findings of fact cannot determine jury issues, as per the Seventh Amendment.

The premise is that reality is whatever the district judge says it is, irrespective of the evidentiary record.

If the standard for appellate reversal of bench verdicts is that the judgment itself must be clearly erroneous, irrespective of the accuracy of the professed evidentiary foundation for the judgment, district judges are free to arbitrarily alter the standard of proof in any bench trial they choose. To win in such circumstances, the unfavored party would have to supply evidence so clear that a judgment against that party would be clearly erroneous. If the unfavored party is the plaintiff, he or she would have to produce evidence well beyond a preponderance or, in this case, clear and convincing. If the unfavored party is the respondent, the plaintiff's burden of proof would be lessened significantly below a preponderance.

The procedural requirement that the judge state his findings of fact and conclusions of law would constitute a *pro forma* irrelevance, as the Court of Appeals would lack the authority to scrutinize the substance of the judge's statement. Only the judgment itself could be scrutinized for clear error.

Yet this is the rule of law that the Court of Appeals implemented in Petitioner's case.

III. CRITICISM OF JUDICIAL CONDUCT SHOULD NOT OPERATE AS A WAIVER OF THE RIGHT TO MEANINGFUL CONSIDERATION OF AN APPEAL

This Court held recently in *Board of County Commissioners v. Umbehr*, ___ S.Ct.___ (1996) that criticism by a county independent contractor of the county board on matters of public concern cannot lawfully precipitate the termination of the business relationship between the contractor and the county. This court held that a contract termination for that reason violated the contractor's First Amendment free speech rights.

Petitioner's allegations against two district judges respectively assigned to this case, and specifically her accusation of impropriety on the part of the judge who shared four stepchildren with one of the respondents in this matter and served openly as an advocate for her, addressed matters of public concern. The Congress in fact has invited litigants with legitimate concerns about possible judicial misconduct to file a complaint with the chief circuit judge, as Petitioner did.

Petitioner cannot demonstrate with certainty that her allegations regarding those two judges were what caused the appellate panel to diverge so starkly from its own written rules and its own common procedural practice in such obvious ways. She can, however, conceive of no other reason for these brazen departures from their own procedural norm.

CONCLUSION

Circuit Rule 53 provided the procedural means for the Court of Appeals to fashion a result in this case that defied the pertinent settled rules of law without declaring an alteration in the law. It provided the procedural means for the court to effectuate its desired result in this case without adherence to the rule of law, or to the concept of the rule of law, because it provided the means to rule without public scrutiny. Similar rules in other circuits provide that cover elsewhere.

If this Court does not act to bar the use of those circuit rules as a means for courts of appeals to diverge at will from applying the law or from formally declaring the law, this practice likely will gain in acceptance and in use.

This Court therefore should grant the petition for a writ of certiorari.

Respectfully submitted,

BEVERLY B. MANN *Petitioner Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645 Chicago, Illinois
(312) 465-4587 August 12, 1996

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 31, 1996

Ms. Beverly B. Mann
7261 North Campbell Avenue
Chicago, IL 60645

Dear Ms. Mann:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on May 31, 1996, extended the time to and including August 16, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk

By

Troy D. Cahill
Assistant Clerk

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 19, 1996

Before

Honorable WILLIAM J. BAUER, *Circuit Judge*

Honorable KENNETH F. RIPPLE, *Circuit Judge*

Honorable ILANA DIAMOND ROVNER, *Circuit Judge*

Nos. 92-3761, 92-3797

BEVERLY B. MANN,	)
	)
Plaintiff-Appellant, Cross-Appellee,	) Appeal from the United States) District Court for the) Northern District of Illinois,
v.	) Eastern Division
	)
CITY OF CHICAGO, et al., *Cross-Appellants.*	) No. 84 C 11020)
	) George W. Lindberg, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiff/appeallant, cross-appellee on February 2, 1996, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, DENIED.

United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued March 30, 1995
Decided January 19, 1996

Before

Honorable WILLIAM J. BAUER, *Circuit Judge*

Honorable KENNETH F. RIPPLE, *Circuit Judge*

Honorable ILANA DIAMOND ROVNER, *Circuit Judge*

Nos. 92-3761, 92-3797

BEVERLY B. MANN,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the United States
Cross-Appellee,	)	District Court for the
	)	Northern District of Illinois,
v.	)	Eastern Division
	)	
CITY OF CHICAGO, et al.,	)	No. 84 C 11020
Cross-Appellants.	)	
	)	George W. Lindberg, *Judge*.

ORDER

Beverly B. Mann filed suit against the City of Chicago, James Montgomery (formerly Chicago'sCorporation Counsel), and Jayne Barnard and Timothy O'Hare (formerly of the Corporation Counsel's

office) after she was terminated from her position as an Assistant Corporation Counsel in 1983. Her Third Amended Complaint asserted claims based on the First and Fourteenth Amendments to the Constitution of the United States, the consent decree entered in *Shakman v. Democratic Organization of Cook County,* and Illinois law; a supplemental complaint also alleged a violation of Title VII of the Civfl Rights Act of 1964, 42 U.S.C. 2000e. A number of Mann's claims were dismissed or disposed of on summary judgment. The case proceeded to trial in 1991 on the Shakman claim and Mann's state law claims for defamation, breach of contract and tortious interference with a prospective economic advantage. The jury found in favor of Mann on the breach of contract claim (awarding damages of $68,285) and on her claim for tortious interference with the prospective economic advantage of continued employment with the City's Law Department (awarding damages of $74,700); but it found against her on her claims of defamation and tortious interference with the prospective economic advantage of alternative employment following her departure from the Law Department. Tne trial judge entered findings against Mann on the *Shakman* claim. Mann has appealed from the adverse disposition of a number of her claims; the City and Montgomery, in turn, have cross-appealed from the verdicts entered against them on the breach of contract and tortious interference claims. After considering all of the arguments raised by the parties, we have concluded that only two claims merit our discussion here: the defamation claim and the claim for tortious interference with the prospective economic advantage of Mann's continued employment with the Law Department. Based on our finding that the jury was erroneously instructed as to each of these claims, we vacate the verdicts rendered (against Mann on the defamation claim, for her on the tortious interference claim) and remand for a new trial on those claims alone; the judgment below is affitmed in all other respects.

I. THE DEFAMATION IINSTRUCTION

In Count VIII of her Third Amended Complaint, Mann alleged that Barnard and O'Hara had defamed Mann by making false statements about her job performance and competence as an attorney to her superiors within the Law Department; Mann also alleged that Barnard made additional defamatory statements to prospective employers outside the Law Department. The parties agree that because Barnard and OHara made any such statements in fulfillment of their duties as employees of the City, they enjoyed a qualified privilege and can only be held liable if Mann proved that the defendants made a defamatory statement or statements with actual malice. *See Krasinski v. United Parcel Serv.*, Inc., 530 N.E.2d 468, 471 (M. 1988); *Anderson v. Vanden Dorpel,* 645 N.E.2d 250, 258-59 (Ill. App. 1994), *appeal allowed,* 652 N.E.2d 338 (1995); *Davis v. John Crane, Inc.*, 633 N.E.2d 9291) 937-38 (111. App. 1994); *Muthuswamy v. Burke,* 646 N.E.2d 616, 620 (Ill. .App. 1993). At issue here is an instruction concerning the malice element of the defamation claim. With the parties' agreement, the district court advised the jury that a statement is made with actual malice ff "the defendant made the statement despite knowing that it was false or despite a high degree of awareness of its probable falsity or entertaining serious doubts as to its truth." R. 406. However, over Mann's objection, the court went on to instruct the jury that "[a] defendant's mere failure to conduct a proper investigation into the truth of a statement before making it to another does not constitute the actual malice required for plaintiff to prevail on her defamation claim." Id (Defendant's Proposed Instruction 4-B.) Mann argues that the additional instruction conflicted with the court's explanation of actual malice and erroneously suggested to the jury that a defendant might not act with actual malice ff he makes a statement without ETst

investigating its veracity, even ff he entertains serious doubts on that subject. We agree.

It is, in one sense, correct to say that the failure to investigate the truth of a statement does not, in and of itself, establish a defendant's actual malice in maldng the statement. *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968); *Troman v. Wood,* 340 N.E.2d 292, 295 (Ill. 1975); *Jones v. Britt Airways, Inc.,* 622 F. Supp. 389, 393 (N.D. Ill. 1985); *Fopay v. Noveroske,* 334 N.E.2d 79, 88 (Ill. App. 1975); *Bloomfield v. Retail Credit Co.,* 302 N.E.2d 88, 96 (ID. App. 1973); *see also Beauvoir v. Rush-,Presbyterian-St. Luke's Medical Cenier,* 484 N.E.2d 841, 844 (111. App. 1985). But this is merely another way of emphasizing that when a defamatory statement is qualifiedly privileged, ordinary negligence will not suffice to establish liability; at a minimum, the plaintiff will have to show that the defendant acted with reckless disregard of its truth. *Durso v. Lyle, Stuart, Inc.,* 337 N.E.2d 443, 446 (111. App. 1975); *Bloomfield,* 302 N.E.2d at 95.

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufgcient evidence to pern3.it the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1325. Thus, when the cases reiterate that the failure to investigate is not alone enough to establish actual mauce, they mean simply that additional proof concerning the defendant's mental state is required. A defendant who repeats information without first checking into its accuracy is not reckless so long as he harbors no serious doubts on that score; on the other hand, a

defendant who has serious reservations as to the veracity of the information may well be reckless if he repeats the information without investigating. *Fopay*, 334 N.E.2d at 88-90. The failure to investigate thus remains "a very important Consideration" in assessing the defendant's culpability. *Fopay*, 334 N.E.2d at 90.

The instruction which the district court gave here is misleading in the sense that it suggests that the element of actual malice requires the defendant to have done, or omitted to do, more than simply failing to look into the truth of the statement he made. In fact, so long as the defendant doubted the veracity of the statement, his failure to investigate may well be enough to establish liability. One who suspects that a statement is inaccurate but decides to make it anyway without attempting to establish its truth evinces an indifference that amounts to actual malice. The instruction was misleading in another, more fundamental sense as well. It focused the jury's attention upon a single circumstance which, albeit highly relevant, ultimately is collateral to the central question in a defamation case - the defendant's regard for the accuracy of the complained of statement. For just this reason, the Illinois Supreme Court in *Reed v. Northwetern Pub. Co.*, 530 N.E.2.d 474, 487 (Ill. 1988), *cert. denied*, 489 U.S. 1067, 109 S. Ct. 1344 (1989), upheld the trial court's refusal to give an instruction which advised the jury that it could infer actual malice from a "grossly inadequate" investigation, emphasizing the court's history of disapproving jury instructions which give "undue prominence" to particular facts. The instruction should likewise have been refused here.

The balance of the instructions given upon defamation did nothing to correct the misguided focus that the "mere failure to investigate" instruction gave the jury. We must therefore conclude that the jury deliberated with an

incorrect impression of the law and that Mann was prejudiced by the mistaken instruction. *See generally DePaepe v. General Motors Corp.*, 33 F.3d 737, 743-44 (7th Cir. 1994). Mann is therefore entitled to a new trial on her defamation claim.

II. TORTIOUS INTERFERENCE WITH THE PROSPECTIVE ECONOMIC ADVANTAGE OF CONTINUED EMPLOYMENT WITH LAW DEPARTMENT

In Count XI of her Tlird Amended Complaint, Mann alleged that Montgomery, O'Hara, and Barnard had all wrongfully interfered with her expectation of continued employment with the city's Law Department. The jury found in favor of O'Hara 'and Barnard on this claim, but against Montgomery. Montgomery contends that the verdict may have been the product of an erroneous jury instruction that advised the jury that the defendants acted with the requisite "actual malice" in interfering with Mann's prospective economic advantage if the jury found that they acted "Mth the intent and purpose to injure the plaintiff' or they acted "without justification." R. 406. Montgomery argues that "without justification" has a very specific meaning in the context of an at-will employment relationship like the one Mann had with the city; and because the district court failed to apprise the jury of what "without justification" meant, Montgomery reasons, the jury may have been misled as to what proof would be adequate to meet this element of the tortious interference claim. Again, we agree.

As an at-will employee of the city, Mann could be terminated for any reason or for no reason at all. *Zimmerman v. Buchheit of Sparta Inc.*, 645 N.E.2d 877, 879 (Ill. 1994) (plurality); *Hanlein v. Illinois Power Co.*, 601 N.E . 2d 720, 728 (Ill. 1992); *Fellhauer v. City of*

Geneva, 568 N.E.2d 870, 875 (Ill. 1991). Although an at-will employee thus has no enforceable *contractual* right to continued employment, the Illinois courts have recognized a cause of action for tortious interference with an at-will employee's legitimate *expectation* of continued employment. *Eg., Fellhauer*, 568 N.E.2d at 878-79.

Montgomery, O'Hara, and Bamard, of course, were not outsiders intermeddling with the relations between Mann and her employer; they were supervisory employees with a duty to oversee and evaluate the work of Mann and other attorneys. *See id.* As such, they enjoyed a qualified privilege to exercise their professional judgment and act in good faith on the city's behalf. *See id.; Mittelman v. Waous*, 552 N.E.2d 973, 987 (Ill. 1989). Thus, only if the defendants acted in a fashion Illinois courts describe as "without justification or maliciously" may they be held liable for tortiously interfering with Mann's expectation of continued employment with the city. Id. at 987; *Fellhauer*, 568 N.E.2d at 878; *Swager* v. Couri, 395 N.E.2d 921, 927 (Ill. 1979); *H.F. Philipsborn & Co. v. Suson*, 322 N.E.2d 45, 50(Ill. 1974).

Although Illinois courts have never expressly articulated a defamation of "without justification" in this context, it is quite clear that they have never employed those words in their ordinary sense - i.e., as the equivalent of "unjustly' or "for no valid reason." Instead, consistent with the nature of a defendant's qualified privilege - that is, to act in good faith for the benefit of his employer - the courts have described tortious conduct to fall principally into two categories: (1) behavior intended solely to harm the plaintiff, and (2) behavior that is undertaken solely for the defendant's interest, and not that of his employer. Ile first of these categories is, quite obviously, what the courts are referring

to when they speak of "malicious" behavior or "actual malice". *See, eg., MGD, Inc. v. Dalen Trading Co.*, 596 N.E.2d 15, 18 (M. App. 1992) ("'[a]ctual malice' is a positive desire or intent to injure another"). The second category is what has been described as conduct undertaken "without justification," and it thus becomes apparent that something unique is meant by those words. In case after case, courts have described this realm of conduct not to include behavior that is irrational, unexplained, or unjust, but actions taken solely for the defendant's own gain and contrary to the best interests of the employer. *See, eg., Fellhauer*, 568 N.E.2d at 878-79; *Mitiebnan*, 552 N.E.2d at 987; *Girsberger v. Kresz*, 633 N.E.2d 781, 790 (11). App. 1993); *see also George A. Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1333 (7th Cir. 1983); *Cromley v. Board of Educ. of Lockport Township High School Dist. 205, 699* F. Supp. 1283, 1299 (N.D. Ill. *1988); Vassardakis v. Parish, 36* F. Supp. 1002, 1005 (S.D.N.Y. 1941). It would be illogical to define the range of culpable conduct otherwise - at win employment after all, implies that it is the employer's prerogative to discharge an employee whether a jury might think it fair or not.

Despite the distinct meaning 'without justification" has in this context, the district court failed to define the term for the jury. With no other meaning to ascribe to the phrase, the jury could only have interpreted the phrase to mean "unfairly." It thus might have found Montgomery liable for tortiously interfering with Mann's expectation of continued employment with the Law Department ff it believed Montgomery acted out of malice or without a reason the jury believed was just. That is plainly a far broader standard than articulated for the tort, and patently inconsistent with Mann's status as an at-will employee. 'nus, we are compelled to conclude that the jury was not properly instructed as to the legal standards governing this claim and

that Montgomery was prejudiced by the mistake. Montgomery is therefore entitled to a new trial.

III. CONCLUSION

For the reasons we have given, we vacate the verdicts rendered in favor of Barnard and O'Hara and against Mann on Count VIII of the Third Amended Complaint and in favor of Mann and against Montgomery on Count XI of the Third Amended Complaint and we remand for a new trial on those claims alone. The judgment below is affirmed in all other respects. The parties shall bear their own costs on appeal.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BEVERLY MANN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 84 C 11020
	)	
JAMES MONTGOMERY, et al.,	)	JUDGE GEORGE W. LINDBERG
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Shakman count of plaintiff's complaint was tried to the court while the balance of plaintiff's claims were tried to the jury. The court has given careful attention to the plaintiffs claim of a Shakman violation and no facts that would support her claim. The court concludes that the paucity evidence requires that the court *find* for defendants on that claim.

FINDINGS

The court finds that the only political aspect in this case of any relevance is that plaintiff was a 1979 patronage hire fresh out of law school and was placed in the Torts Division of the City of Chicago Law Department without any experience and little, if any, preparation for the courtroom. She was the 'beneficiary' of a political patronage appointment by Jay McMullen, the husband of then-Mayor Jane Byrne, without any consideration or evaluation of her skills or interests beyond a perfunctory interview by the then-chief of the Torts Division. Plaintiff s father is a friend of

McMullen's from the days when they worked together at the now-defunct Chicago Daily News.

Appallingly, this fledgling lawyer was assigned a smothering caseload of 500 to 600 tort cases. The record shows that during plaintiff s tenure under the Byrne administration there was little or no effort to assist her or any other division lawyer, with second-chair trial experiences or trial practice seminars. The record makes it abundantly clear that, resultantly perhaps, plaintiff was reluctant to try cases, a reluctance which appears to have persisted throughout her career in the Torts Division to 1984 when she was terminated resulting in this lawsuit. Much of the dispute in this case turns on the parties' respective characterizations of this reluctance. Plaintiff ascribes her reluctance to the highest objectives of the legal profession and presumably the best interests of the administrations she served (Harold Washington dispossessed Jane Byrne of the mayor's office in the spring of 1983), that is, to settle cases rather than risk losing by a big verdict against the City including the risk of adverse newspaper publicity.

On the other hand, the chief of the division, defendant Tim 0'Hara who had been personally sponsored and hired by Mayor Richard J. Daley, testified that the plaintiff was reluctant to try cases. This was in contrast to other lawyers in the division who were anxious to build a trial record to enhance their value when subsequently seeking employment with law firms. It is clear that O'Hara felt that plaintiff was not ready and willing to try cases which he also wanted to settle if possible. He testified that during negotiations it was necessary that the lawyers on the other side feel that if they didn't settle with the City, the City's lawyers were anxious or at least had no hesitancy to go to trial. Such was the relationship of plaintiff and her chief throughout the employment and without regard to whether her political sponsor was in office or not.

Another point of friction between plaintiff and her supervisor, defendant O'Hara, was his 1983 and 1984 formal evaluations of

her. It came to pass with the advent of the Washington administration, that defendant Montgomery was appointed Corporation Counsel and was charged with the objective of making the Law Department a high quality law *firm* of which Mayor Washington could be proud. Washington had served in the Law Department earlier in his career and considered it a meritless patronage office, with most of its lawyers having private practices on the side, according to Montgomery. Decisions were made to increase the size of the department by hiring more lawyers and obtaining additional space, eliminating outside law practices, reducing caseloads, instituting training programs, ascertaining existing lawyers' legal interests for possible reassignment within the department, and instituting a formal program of annual evaluations of lawyers performance and ability.

The evidence established that defendant Jayne Barnard and her husband were lawyers with the firm of Jenner and Block. Although she was a partner, she left the firm and was hired by Montgomery to assist him in a the foregoing objectives. She explained that she had been active in organizations that opposed patronage and saw working in the Washington administration as an opportunity to put her views on the subject into practice. She drafted the 1983 evaluation form and trained the chiefs in its use for the first for the first formal evaluations to be conducted in the Law Department.

The evidence further established that the ratings of plaintiff in the 1983 and 1984 evaluations form a significant basis of plaintiff's claim of her discharge for political reasons. She vehemently and consistently criticized those of O'Hara's gradings of her that were less than 'satisfactory,' particularly on issues relating to trial, and his failure to rate her at all on what she considered her strengths - issues relating to research and writing. In fact, in the 1983 post-evaluation conference where the Barnard program called for the supervisor and the employee to discuss both the supervisor's evaluation of the lawyer

and the lawyer's evaluation of himself or herself, O'Hara changed his evaluations on some of the parameters to reflect satisfactory performance on issues relating to litigation.

Based at least in part upon O'Hara's less than favorable position regarding plaintiff's value to the division even before the evaluation program was instituted, she was initially denied the January 1, 1983, 10-15% increase granted to most of the other lawyers in the Law Department. Instead she received only 5%. She complained through her father to Stanley Garber, the Corporation Counsel during the Byrne administration, and plaintiff was given the 15% increase.

As a result of the 1983 evaluation of plaintiff by O'Hara and the aggressive approach of defendants to implementing the policies of the Washington administration, a special assignment was carved out for plaintiff to begin June 1, 1984. Except for a few cases from her caseload, she was relieved of trial responsibilities. Instead, she was to become a specialist drafting and consulting with other lawyers on motions. She was also to start an intra-office newsletter on different subjects. The evidence establishes that this was as an attempt by the Washington administration to accommodate plaintiff's interests in legal research and writing and to relieve her, and her chief, of the strain of their continuing disagreement concerning her reluctance to try cases and mm judicial criticism of her performance or attitudes. It should be noted that the City prevailed in the few cases she tried. The evidence indicates she only tried two or three cases to verdict from 1979 to June 1, 1984, when she was to start her new assignment.

On July 27, 1994, O'Hara again evaluated plaintiff lower generally in the same litigation categories. However the supervisor/lawyer conference for 1984 did not take place as it had the previous year. Instead, and without the benefit of her self-evaluation and the conference, because of time constraints according to O'Hara, his evaluation went directly to

defendant d who drafted notes of its highlights and presented them to Montgomery along with the evaluations of other Torts Division lawyers. Thereafter, on August 3, 1994, Montgomery decided to discharge plaintiff.

Plaintiff retained counsel who succeeded in negotiating a termination agreement for plaintiff. The alleged breach of that agreement was one of the subjects of the jury's verdict in the instant case.

Plaintiff argues that there is no question that she was covered by the Shakman decree and that she established that she was in a nonexempt position as listed in the Shakman decree. Plaintiff maintains that the record discloses 'substantial evidence' that plaintiffs termination was politically motivated, the third element of a Shakman case. Principally, plaintiff argues that defendant Montgomery attempted to create 'slots for attorneys' hired by the Washington administration by firing or reassigning attorneys hired by previous administrations. The court finds, however, there was no evidence that would lead to this conclusion. In fact the record is to the contrary in that it was established that the size of the department was increased. The increased size of the Law Department resulted in a diminution in caseloads from 500 to 600 per lawyer during the Byrne administration to about 250 cases per lawyer during the Washington administration.

Plaintiff does acknowledge that because Byrne left office, plaintiff no longer had the political 'clout' necessary to hold her job. However, plaintiff cites no authority for the proposition that, where a patronage worker loses his or her patronage and is thereafter terminated for lack of merit, of violation of the Shakman decree occurs.

Finally, plaintiff contends that when defendant Montgomery agreed to give a speech to a convention of municipal lawyers he publicly espoused the view that a

public employer should simply never admit a political motive. Plaintiff points to this speech, which was drafted by a staff member and not reviewed by Montgomery, and was actually delivered by another staff member when Montgomery found that he could not attend, established the motivation for plaintiff's discharge. The court agrees that this position attributable to Montgomery could, along with other evidence, establish Montgomery's intent in discharging plaintiff. However on the record there is no such evidence and, indeed, there is a great deal of evidence tending to establish that Montgomery's motivation in running the Law Department generally, and in particular in terminating plaintiff, was to run the Law Department as a high quality law firm and not on the basis of political patronage.

As defendants note, to prevail on her claim plaintiff must prove by clear and convincing evidence that she would not have been terminated but for her partisan political affiliations. Shakman v. Democratic Organization of Cook Cty., 533 F2d 344, 351 (7th Cir 1976); Wzorek v. City of Chicago, 708 F Supp 954, 959 (N D Ill 1989), aff'd in part, rev'd in part, on other grounds, 906 F2d 1187 (7th Cir 1990). The court agrees with the conclusion of defendants that there is no evidence, much less clear and convincing evidence, that politics motivated plaintiff's discharge.

Judgment for defendants.

NOV 8 1991

Date:

George W. Lindberg
United States District Ju

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BEVERLY MANN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 84 C 11020
	)	
JAMES MONTGOMERY,	)	JUDGE GEORGE W.
et al.,	)	LINDBERG
Defendants.	)	

MEMORANDUM OPINION

The United States Court of Appeals for the Seventh Circuit has remanded this case for the limited purpose of permitting this Court to enter a statement of reasons for its granting partial summary judgment in favor of defendants. US Ct App, 7th Cir CR 50.

The order granting partial summary judgment was entered on August 13, 1991. At that time, there were pending plaintiff's Supplemental Complaint and Counts 1, 11, 111, VII, VIII, X, XI, and XII of plaintiff's Third Amended Complaint. Summary judgment was denied as to Counts I and VIII of the Third Amended Complaint.
Count 11 alleged a Section 1983 political discrimination claim. 42 USC 1983.

The Illinois Appellate Court has described the City of Chicago Law Department and its attorneys as follows:

> [A]II of the attorneys work in multiple areas and . the demands of the client (i.e., the City of Chicago) are

such that an attorney may be assigned to the Torts Division on one day and the Labor and Personnel Division the next. . . .

Second, all of the Law Department attorneys have the authority to recommend changes in the manner in which the city operates. Indeed, the record reveals that the city depends on the recommendations from the Law Department to function on a day-to-day basis. The Law Department attorneys review all legislation voted upon by the City Council, assist alderman [sic] and city departments on rules and regulations, draft personnel ordinances for city employees, carry out the mayor's executive orders regarding hiring quotas, take measures to increase revenues for the city budget, recommend changes in the city's labor contracts with outside unions, alter the city's licensing policies and practices, and review and modify all of the personal service contracts executed by the city.

Third, the Law Department attorneys exercise a tremendous amount o discretion on behalf of the city. . . .

[A]lthough there are senior members (i.e., Supervisors), all of the attorneys exercise managerial discretion on behalf of the city. All of the attorneys are involved in hiring, have access to all files, and may be assigned to labor-related matters. The authority structure within the Law Department is diffused rather than rigid. And, all of the attorneys i-nay, at any time, be assigned to work closely with the mayor or his advisors on special projects vitally important to the interests of the city.

Salaried Employees of North America (SENA) v Illinois Local Labor Relations Board, 202 III App 3d 1013@ 560 NE2d 926, 933-34 (1990). Given the breadth of the duties of Law Department attorneys, their authority to recommend changes in the manner in which the city operates, their tremendous amount of discretion, and that they may be called upon to work closely with the mayor or his advisors at any time, their political affiliation is an appropriate consideration when they are terminated. Williams v City of River Rouge 909 F2d 151, 155 (6th Cir 1990 ("Given the function of a citv attorney and the decisions of courts that have addressed the issue, it is difficult to imagine a set of facts under which it would violate the first amendment to fire a city attorney for purely political reasons."). See Hudson v Burke, 913 F2d 427, 434 (7th Cir 1990) ("Appellants were political hires whose sponsor lost power. . . . Political affiliation was an appropriate consideration when they were hired, and was equally appropriate when they were fired."). Therefore, defendants were granted summary judgment on Count 11.

Count III alleged that plaintiff was deprived of liberty without due process of law by certain statements made about her. 42 USC 1983. In a footnote to her response to defendants' motion for summary 'judgment, plaintiff stated:

> Plaintiff's claim for deprivation of liberty was significantly limited by Judge Moran's prior Order to the phrases "paranoid" and "emotionally disturbed". Although these phrases were used to describe plaintiff within the Corporation Counsel's Office, plaintiff is not pursuing a claim for publication of either description Outside the office. Plaintiff, however, intends to seek *reconsideration* of Judge Moran's earlier decision limiting the claim. For this reason, this Response does not address Count 111.

(Emphasis added). Plaintiff thus stated that she was not pursuing the only portions of Count III remaining after the

disposition of the prior motion to dismiss by Judge Moran. For this reason, defendants were granted Summary judgment on Count 111.

The portion of Count VII remaining at the time of the ruling on the motion for summary judgment and the Supplemental Complaint alleged related claims. Count VII alleged a Section 1983 claim for violation of equal protection by discrimination against plaintiff because of her gender. 49 USC 1983. The Supplemental Complaint alleged a-claim for sex discrimination in violation of Title VI[of the Civil Rights Act of 1964. 42 USC 2000(e), et seq. Tile Supplemental Complaint's sex discrimination claim will be addressed first.

Plaintiff contended that there was direct evidence of sex discrimination in terminating her from her job, in that there was evidence that defendant Montgomery considered sexual stereotypes in terminating her. Plaintiff noted that:

> Mr. O'Hara evaluated plaintiff's performance in the terms of her physical appearance. Mr. O'Hara made specific note of plaintiff's "attractive" appearance while male attorneys were spared that indignity.

However, in the context in which the "attractive" comment was made--O'Hara calling her an "attractive, very intelligent attorney"--it was a positive remark. There was no evidence that it was considered by defendant Montgomery to be in any way negative, much less to be a factor in favor of terminating plaintiff. Plaintiff further noted that:

> Beverly Mann was perceived has having, "bitched" too much about her treatment although with good reason.

Use of the word "bitched" is not of itself proof of a sexual stereotype, "bitched" being common slang for "complained. "

Webster's Third New International Dictionary 222 (1986). There was no evidence that the word "bitched" was used as a sexual stereotype, and there was no evidence that male employees acting as plaintiff acted would not have been "perceived as having 'bitched' too much" about their treatment. Plaintiff also stated that:

> The record also clearly establishes that Mr. Montgomery, considered comments that Beverly Mann was too pushy or aggressive and lacked humility in determining to terminate her. . . .

There was nothing wrong in defendant Montgomery s considering plaintiff's having poor interpersonal skills, see Price Waterhouse v Hopkins, 490 US 228, 236, 109 S Ct 1775, 1783 (1989), and there was no evidence that he would have considered the same traits as positive or even neutral in a male employee. There was, in short, no direct evidence of sex discrimination in the decision to terminate plaintiff.

Plaintiff contended that Price Waterhouse was a case very similar to hers. Price Waterhouse v Hopkins, 490 US 228, 109 S Ct 1775 (1989). However, in that case there was very strong, evidence of sexual stereotyping in the employment decision. The plurality opinion states:

> There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" . . . ; another suggested that she "overcompensated for being a woman" . . . ; a third advised tier to take "a course at charm school" . . Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another Supporter explained that Hopkins "ha[d] matured from a tough-talking

somewhat masculine hard-nosed mgr to an authoritative, formidable, but Much more appealing lady ptr candidate." But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.....

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping--although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion oil a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion Without having, met any of the people involved in the decisionmaking, process.

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers"; in this environment, "[t]o be identified as a 'women's lib[b]ER' was regarded as [a] negative comment..... In fact, the judge found that in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning, as senior managers--yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations." Price Waterhouse v Hopkins, 490 US 228, 235-36, 109 S Ct 1775, 1782-83 (1989). Plaintiff at bar had no evidence remotely similar to that in Price Waterhouse; she presented no evidence of overtly sex-based comments that affected the decision to terminate her, presented no expert testimony that

gender-neutral remarks were the product of sex stereotyping , and presented no evidence that other female employees were evaluated in sex-based terms.

Plaintiff also contended that there was indirect proof of sex discrimination. Texas Department of Community Affairs v Burdine, 450 US 248, 101 S Ct 1089 (1981). See McDonnell Douglas Corporation v Green, 411 US 792, 93 S Ct 1817 (1973). However, defendants articulated a legitimate, nondiscriminatory reason for plaintiff's termination. Texas Department of Community Affairs v Burdine, 450 US 248, 253, 101 S Ct 1089, 1093 (1981). It was undisputed that defendant Montgomery was the decisionmaker with respect to plaintiff's termination. Based upon defendant O'Hara's 1983 and 1984 evaluations, defendant Montgomery concluded that plaintiff's poor job performance justified terminating her.

Plaintiff contended that defendant Montgomery was not justified in relying upon defendant O'Hara's evaluations, because Montgomery "was aware that these subjective evaluations were less than candid." However, defendant Montgomery's concern about the candidness of the evaluations was that they were overly positive about employees-, that supervisors, including defendant O'Hara, were too reluctant to put negative information about employees in the evaluations. Moreover, plaintiff never told defendant Montgomery that she believed defendant O'Hara had a discriminatory animus toward her because of her sex. She did inform-n defendant Montgomery of remarks defendant O'Hara had made, but as discussed previously these remarks were not sexual stereotypes so that would not serve to put defendant Montgomery on notice that defendant O'Hara's negative evaluations were based on sexual animus toward plaintiff. There was, in other words, no reason for defendant Montgomery not to rely upon defendant O'Hara I s evaluations in making the decision to terminate plaintiff.

Plaintiff also contended that Montgomery promoted her shortly before her termination, and claimed that this act was inconsistent with his believing that her job performance was poor. In fact, plaintiff was reassigned from a position in which she was trying tort cases to a position in which she was supervising law students preparing motions. This sort of reassignment does not rebut the evidence that defendant Montgomery believed plaintiff's job performance was poor.

Thus, there was no direct evidence of sex discrimination; defendants produced evidence that the decisionmaker, defendant Montgomery, terminated plaintiff for poor job performance; and plaintiff failed to produce evidence that this reason was a pretext for sex discrimination. This Court accordingly granted defendants summary judgment on the Supplemental Complaint.

The portion of Count VII remaining at the time of the ruling, on the motion for summary judgment was a Section 1983 claiim that plaintiff had been discriminated against because of her sex in violation of the equal protection clause. In order to establish this claim plaintiff would have to prove not just that she was treated differently from other similarly situated employees, but also purposeful and intentional discrimination based on her membership in a particular class (i.e., that defendants acted with discriminatory intent). Sims v Mulcahy , 902 F2d 524, 538-39 (7th Cir 1990). This requirement of proof of discriminatory intent makes the burden on a plaintiff alleging a Section 1983 equal protection sex discrii-nination claim much heavier than the burden on a plaintiff alleging a Title VII claim. Finally, similarly to the Title VII indirect proof analysis:

If a prima facie case of racial discrimination Linder the Equal Protection Clause is established,

> "the burden then shifts to defendants to articulate a legitimate nondiscriminatory reason for taking the action alleged by plaintiff to be

discriminatory. If defendants do articulate such a reason, the burden then shifts back to plaintiff to demonstrate that the proffered reason is merely a pretext for discrim-ninatioii."

Sims v Mulcahy , 902 F2d 524, 539 (7th Cir 1990). quoting Webb v City of Chester, 813 F2d 824, S'-'S (7tli Cir 1987).

Defendants were entitled to summary judgment on the Section 1983 equal protection sex discrimination claim ill Count VII for the same reasons that they were entitled to summary judgment on the Title VII claim of the Supplemental Complaint. In addition, plaintiff did not present evidence that defendant Montgomery harbored a discriminatory intent when he decided to terminate her employment with the City of Chicago Law Department. For these reasons, defendants were granted summary judgment on Count VII of the Third Amended Complaint.

Count X alleged breach of a contract relating to what was to be told prospective employers or other persons contacting the City of Chicago Law Department about plaintiff. Summary judgment on this claim was granted in favor of defendants O'Hara and Barnard because they were not parties to the contract alleged. The other defendants, Montgomery and the City of Chicago, were parties to the contract alleged, so summary judgment was denied to them on Count X.

Count XI alleged both tortious interference with plaintiff's employment contract and tortious interference with her prospective economic advantage from her continued employment. Because plaintiff's employment was at-will, the court granted defendants summary judgment with respect to the tortious interference with a contract claim, plaintiff under those circumstances being unable to establish the element of that tort

that her employer breached the employment contract. See Fellhauer v. City of Geneva, 142 III 2d 495, 568 NE 2d 870, 877-79 (1991); Delphi Industries. Inc Stroh Brewery Co., 945 F2d 215, 220 (7tli Cir 1991). See also Alistar Music, Inc. v Eckhoff, 629 NE2d 816, 821 (111 App 1994) (setting forth the elements of tortious interference with contractual relations). This rationale does not apply to tortious interference with prospective economic advantage. Therefore, summary judgment was granted in defendants' favor on the tortious interference with a contract claim but not on the tortious interference with prospective economic advantage claim of Count XI.

Count XII alleged a claim for violation of the Illinois Personnel Records Act, III Act Stat ch 48, 2001, et seq. (West 1986) (the Act). The Illinois Supreme Court has held the Act unconstitutionally vague, Spinelli v Immanual Lutheran Evangelical Congregation. Inc., 118 III 2d 389, 515 NE2d 1222 (1987). Plaintiff argued that summary judgment nonetheless Should not be granted on Count XII because (1) the Act was subsequently amended and (2) Spinelli did not address Section 2006 which provided the basis for plaintiff's Count XII. As to plaintiff's first contention, the subsequent amendment of the Act cannot be applied to defendants' conduct prior to its effective date; this is particularly true in this case, where the Illinois Supreme Court held the statute unconstitutionally vague because it did not provide sufficient notice to employers of their obligations under the statute. As to the second contention, the Court in Spinelli stated:

We therefore agree with the appellate court that the Act is vague and uncertain, and therefore, is unconstitutional in that it violates the due process rights of employers.

Spinelli v Immanuel Lutheran Evangelical Congregation. Inc. . 118 III 2d 389, 515 NE2d 1222, 1228 (1987). Thus, tile

Illinois Supreme Court held the entire Act unconstitutional, and not only the sections of it specifically involved in *the case before* the Court. Accordingly, defendants were granted summary judgment on Count XII

ENTER:

GEORGE W. LINDBERG
District Judge

DATED: 7-18-94

A. We had discussions regularly about Beverly's attitude about cases about that.

Q. And Beverly Mann in these cases would tell you that she thought the risks were too great to run?

A. She would tell me: We have this terrible witness here, and this was bad about this case. And there was always something about every case that she had that she was crying that there was something wrong with the case and we should try to settle it.

Q. That's her job, right, to evaluate the case, to tell you what's good about the case, tell you what's bad?

A. Her job was to dispassionately tell me what the facts of the case were. And she did not dispassionately tell me; she would get teary eyed and all upset.

Q. Did you ever disagree with her?

A. Yes.

Q. Did you tell her to try the cases?

A Yes.

Q. And she went to trial?

A. Yes.

Q. What more did you want her to do?

A. I did not feel that I could force her to trial on every case that I thought she should be ready to try.

Q. Did you pull it away from her?

A. I effectively pulled it away from her one way or the

THE COURT: May have to.

MR. MORAN: As part of your offer of proof, from whom will she say that she learned of this policy that she says -- that you're representing she thought Mr. O'Hara was violating?

MR. DiVINCENZO: She's going to testify that it was her understanding of her role that she was supposed to make recommendations as to which cases should be tried and which cases shouldn't be tried, and that she was supposed to argue and make recommendations if the case was, if the liability risks were too great, to dispose of cases as cheaply as possible under the circumstances. And that apparently is not what Mr. O'Hara's philosophy was.

MR. MORAN: Your Honor, the offer of proof is wholly insufficient.

THE COURT: Yes, I'm going to stick with the original ruling.

MR. DiVINCENZO: Fine, your Honor.

(End of side bar.)

THE COURT: I think this might be the time to take a break.

MR. DiVINCENZO: That would be fine, your Honor.

MR. MORAN: Excuse me, your Honor, one more thing at side bar.

THE COURT: Yes.

(Proceedings at side bar:)

MR. MORAN: I would just ask that before we take the break, that you let the jury know that the objection was sustained.

THE COURT: Yes.

(End of side bar.)

THE COURT: The objection is sustained.

And someone should be coming out in just a moment.

You can disconnect there, Mr. O'Hara.

THE WITNESS: Thank you, your Honor.

(Recess.)

(The jury enters.)

THE COURT: You may be seated.

And you may resume.

MR. DiVINCENZO: Thank you, your Honor.

BY MR. DiVINCENZO:

Q. Mr. O'Hara, in Duties, is it not correct in 1983 that the only less-than-satisfactory grade that you gave Beverly Mann was on trial?

A. That is correct.

Q. Is it not correct that Beverly Mann's trials all saved th City of Chicago money?

A. Yes.

Q. That was either because she got no-liability verdicts, city not liable for anything, or received verdicts below what the plaintiff was demanding in their final settlement demand?

Q He was mayor at the time that you did that work for him?

A Yes.

Q Then Jane Byrne was mayor at the time that you did the work for her, right?

A Yes, that's correct.

Q Did you ever wear a Washington button?

A Yes, I did.

Q Now, sir, when did you leave the employment with the City of Chicago?

A 1985.

Q Why did you leave?

MR. MORAN: Objection.

MR. DI VINCENZO: May we approach?

THE COURT: You may.

(The following proceedings were had at side bar out of the hearing of the jury:)

MR. DI VINCENZO: Your Honor, they opened the door to the question that they just went into going into the performance evaluations because they implicated that there was nothing political going on here at all, that he wasn't political, that Mr. Montgomery's concerns about him weren't political. That opened the door.

MR. MORAN: First of all, this is the limine order in the case. This is the third time that counsel has done this. My understanding of the limine order is that if he

feels the door is opened and the order is to be reconsidered, he is to ask the Court to reconsider the order before he asks the questions, and this is the THIRD time.

THE COURT: Is this designed as to any?

MR. MORAN: Your order specifically says that.

THE COURT: Are his questions designed to --

MR. DI VINCENZO: The question is designed to go to the political issues to indicate the politics.

MR. MORAN: One of the specific things that the order says, which are about to be gone into, are the circumstances under which any of the individual defendants left the employ of the City of Chicago. Get the order.

THE COURT: I guess you better.

MR. DI VINCENZO: I don't dispute that that's what the order says.

THE COURT: Okay.

MR. MORAN: Maybe it would be a good time to take the morning break for the jury.

(The following proceedings were had in open court in the presence and hearnig of the jury:)

THE COURT: Okay. Ladies and gentlemen of the jury, we will take your morning recess now until about 10 minutes to 11:00. Diane or someone should be here in a minute.

(The following proceedings were had in open court outside the presence and hearing of the jury:)

MR. MORAN: Judge, just for the record I want to read the language of the order, and I will hand it to you. The second sentence states, and I quote, "Evidence regarding defendants' job performance will be admitted only as it concerns their performance evaluations of plaintiff.

Other evidence of job performance and evidence regarding the circumstances under which defendants ended their employment with the city is excluded from trial."

As I said before, that order has no effect at all. When counsel believes that the door has been opened, he just proceeds to ask questions pertaining to that without consulting the Court to see whether the Court agrees that the door had been opened and therefore to modify or rescind its order. This is the third time we have had to do this. I ask the Court to hold to the ruling and sustain the objections and admonish counsel he is not to ask these types of questions while the order is still in effect unless he persuades the Court to withdraw or modify the order.

MR. DI VINCENZO: I asked the question because they opened the door in the middle of the examination. They can't hide behind a limine order and bring the things in. It would be disruptive to the proceeding every time I think the door is open to make a motion and ask the jury to leave.

THE COURT: Where was that raised?

MR. DI VINCENZO: Your Honor, they got into the

circumstances at the end of the examination in which they were talking about political issues in this case.

MR. MORAN: The questions were whether he ever considered the plaintiff's political affiliation in doing his evaluations and whether Mr. Montgomery ever directed him as to what he ought to put in his evaluations.

That's strictly within the scope of the order and goes to the evaluations and nothing further. It does not open the door to have your Honor reconsider the order.

MR. DI VINCENZO: We believe the testimony of the witness will be on an issue that one of the reasons he was terminated was because of Beverly Mann. He was terminated immediately after the filing of the lawsuit, and as a result, that was a direct implication and the relevance of the evidence.

They brought it up as to the issue of what Mr. O'Hara knows about Mr. Montgomery's motivations, and this would go to that issue directly.

THE COURT: Only as to the questions were limited to whether Mr. O'Hara had a political motive or Jim Montgomery with regard to the plaintiff, and the answers were absolutely not.

MR. DI VINCENZO: Right.

THE COURT: I don't see that that violates the in limine order.

MR. DI VINCENZO: I am not suggesting it does, your Honor. I am suggesting it's absolutely not. Then when I am attempting to probe that the absolutely not is not the truth, that there were politics involved and he was fired under circumstances, that raised that issue.

THE COURT: Okay. You are going beyond the plaintiff here. Those are questions relating to this plaintiff, which is not circumscribed.

MR. DI VINCENZO: Your Honor, I can narrow the question down to specifically relating to the plaintiff and ask him whether he was terminated for anything to do with the filing of the plaintiff's lawsuit or the plaintiff's termination. I would be happy to do that at this time.

MR. MORAN: Judge, the circumstances under which Mr. O'Hara left the employment of the city are totally irrelevant. When we filed this motion, that was the basis of this. The response that the plaintiff filed to the motion said in essence, of course, their performance of their duties is relevant as it pertains to the manner in which they evaluated Beverly Mann.

Our reply brief said: "If that's all they want to go into, then the motion ought to be to that extent granted as without objection because we want to exclude other things, particularly the dispute between Mr. Montgomery and Mr. O'Hara about the philosophy of settling cases and the fact that Mr.

Montgomery ultimately asked Mr. O'Hara to leave the employment of the City of Chicago, and he did resign."

That's what we attempted to keep out. They never in their response said, "Oh, we want to bring that in and here's why it's relevant." Instead they keep asking the questions counter to the order during the course of the trial.

MR. DI VINCENZO: Your Honor, we were unaware at the time that we wrote this, if we might point out, that it was not us that brought up the issue of the reason for Mr. O'Hara being asked to resign. That's now come up as a result of the examination with Mr. O'Hara.

THE COURT: I don't believe it has, but you have indicated that you want to modify the question to whether or not Mr. O'Hara was terminated because of his evaluation of the plaintiff. Is that the point you want to make? I thought I heard you say that.

MR. DI VINCENZO: Your Honor, whether or not it had to do with the filing of two things. The filing of plaintiff's lawsuit and, secondly, the termination of the plaintiff, correct, your Honor.

MR. MORAN: Well, I think that's not correct because he said everything. Was he going to ask him whether he was asked to resign because of his evaluations of the plaintiff, which you indicated that that's the sole issue. The lawsuit is different, and the termination is different.

THE COURT: Yes.

MR. DI VINCENZO: Those would be the questions, your Honor.

THE COURT: I understand from Mr. Moran that he has no objection to a question with regard to whether or not Mr. O'Hara was terminated because of his evaluations of Beverly Mann. Am I correct?

MR. MORAN: I can't think of an objection now. I certainly think that it's something that would be permitted by the order. Although, the order says the circumstances of leaving the office, but if that's the question and your Honor thinks that that's allowed by the order, that's your ruling. I don't want to be in a position by saying I waive any objections.

THE COURT: Let me just ask Mr. DiVincenzo this. What's the scope of your question?

MR. DI VINCENZO: Certainly that question is -- One of the questions that I would like to go into at this time is whether Mr. O'Hara left as a result of anything to do with his evaluation of Beverly Mann.

Secondly, however, to go beyond that slightly as to whether or not he left under circumstances of anything to do with the lawsuit because I think that also goes to the issue even if he won't admit that it had something to do with his evaluations.

If he was asked to leave under circumstances directly connected to the lawsuit, I think that an inference can be argued from that that that had something to do with his evaluation procedure, and I would like to broaden it slightly to ask if it had anything to do with it because the evaluation was part of the termination process.

Ask a follow-up question, whether it didn't have to do with the specific written evaluations, anything to do with the conduct in the determination of the plaintiff. I think that would cover the basis at this point, your Honor.

MR. MORAN: You have already indicated, Judge, that you don't think the door has been opened.

THE COURT: I am sure the door hasn't been opened. I am now at a point where you have indicated -- Had the plaintiff at the time that this issue came up indicated that the questions were to be limited to whether or not Mr. O'Hara was discharged because of his evaluations of plaintiff, that you would have no objection. If that be the case, I will allow that question to be asked now.

I don't think I will allow -- As a matter of fact, I will not allow it to go beyond that.

MR. MORAN: May I make one other point? I think that depending -- Well, I guess we will cross that bridge when we come to it.

THE COURT: Okay. The ruling is that the ruling in

limine prevails with the exception that I will permit a question to be asked whether or not Mr. O'Hara was terminated because of his evaluations of the plaintiff.

MR. DI VINCENZO: Your Honor, one other matter, and we brought this up to a degree. It really became only apparent right now, but Mr. Moran and Miss VanAllen are both participating concerning this witness. One examines and one objects.

Your Honor, I think at some point in time that that procedure is slightly inappropriate, and I think now would be a good time to get ground rules straight.

MR. MORAN: Judge, I thought we had gotten this straight in the pretrial conference when your Honor said that you would take objections of only one attorney, that it could be the lead attorney or the attorney that is questioning the witness, and we adhered to that.

THE COURT: I don't remember that.

MR. MORAN: I thought that's what you said during the pretrial conference.

THE COURT: Ordinarily I limit it just to the questioner. I don't remember that.

MR. DI VINCENZO: It was with the questioner of the particular witness that would be handling the entire examination and the objections.

THE COURT: That's the way I operate. I can't

imagine I would say otherwise. Okay. Carry on.

MR. MORAN: It seems to me that one of the problems with your ruling -- and I am not going to ask you to reverse your ruling, but I am going to suggest a procedure to deal with the problem. Mr. DiVincenzo has suggested that the witness would testify in a certain way, and I think that was part of your Honor's ruling.

I don't frankly know what the answer to that question is going to be. The problem is if he is asked the question in the presence of the jury and he answers "No", the jury will still have learned that he was asked to resign by Mr. Montgomery.

So what I would suggest that based on the question being "Weren't you terminated because of your evaluations with Beverly Mann" -- Now, I would suggest that the question be asked and answered by the witness outside the presence of the jury in the first instance. If the answer is yes, then the jury be brought in and the question and answer repeated.

If the answer is no, then there is no basis for the jury to learn that in fact Mr. O'Hara had been asked to resign since that itself is not relevant.

MR. DI VINCENZO: Your Honor, I do not intend to phrase the question in that manner. During the break, I phrased the question and wrote it down so I'd make sure that

didn't cause the problem that Mr. Moran is alluding to.

My intention was to ask: Was your leaving the Department of Law of the City of Chicago in any way related to your performance evaluation of Beverly Mann?

That does not imply -- It leaves the door open for it either to be a voluntary or any act. It does not imply the circumstances.

MR. MORAN: I still think it would be appropriate that that question be asked in the first instance outside of the presence of the jury in the nature of a formal offer of proof, which is what informally Mr. DiVincenzo had mentioned in his article.

THE COURT: Out of abundance of caution, I will allow that question to be answered now outside of the presence of the jury, and let's see where it takes us.

THE COURT: Can you answer?

THE WITNESS: No.

MR. DI VINCENZO: May I raise one other issue?

THE COURT: He answered "No."

MR. DI VINCENZO: Your Honor, I would like to raise one other issue in an abundance of caution. The motion in limine goes to the reasons why he was terminated from his position. I take it, under the motion in limine, since I don't want to be accused of violating it, it does not go to the issue of for what reasons he was demoted in this position.

MR. MORAN: The motion in limine goes to anything related to the performance of his duties.

THE COURT: I will have to go for the file. Just a minute.

MR. DI VINCENZO: Your Honor, I can obviate this. I will not get into the request at this time.

THE COURT: Go ahead.

MR. DI VINCENZO: Your Honor, I don't think at this point -- I will not ask that question at this time.

THE COURT: Okay.

MR. MORAN: I would ask that counsel be admonished that if he feels that the door has been opened for this order to be reconsidered, that he ask the Court whether the Court agrees with that prior to asking any questions that are in conflict with this order. Otherwise it's the same as if there was no limine order entered in the first place, and the question gets asked and I have to object to it.

THE COURT: Well, the ordinary order of things is if there is a question that's asked that appears to be in violation of a ruling on a motion in limine, you have to object and bring it to the Court's attention. I don't think it's appropriate to require plaintiff to anticipate your objection unless it becomes abusive or appears to be excessive.

(The following proceedings were had in open court in the

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BEVERLY MANN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Docket No. 84 C 11020
	)	
CITY OF CHICAGO,	)	Chicago, Illinois
et al.,	)	September 15, 1989
Defendants.	)	9:15 o'clock, a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE PAUL E. PLUNKETT

PRESENT:

For the Plaintiff: MR. MICHAEL J. LEECH
Hinshaw, Culbertson -
Chicago, Illinois

For the Defendants: MS. MARIA C CAMPO and
MR. TERRY MORAN
Asst. Corporation
Counsel
City of Chicago
180 North LaSalle St.
Chicago, Illinois

Court Reporter: Joseph R. Betz,
U. S. District Court
Chicago, Illinois

THE CLERK: 84 C 11020, Mann versus City of Chicago;status.

MR. LEECH: Good morning, your Honor. Michael Leech on behalf of the plaintiff.

MS. COMPO: Good morning, your Honor. Marie Compo and Terry

Moran on behalf of the defendants.

MR. LEECH: I understood we were here this morning for a ruling, your Honor.

THE COURT: That's right, you are. On the defendants' position that they are entitled to go into the plaintiff's privileged conversations with her doctors, if such there are, I am going to modify Judge Balog's order somewhat and I am going to explain to you what I am doing.

I perceive that the defendants position that they are entitled to go into all of this because the plaintiff says 'I had emotional distress as a result of the actions of the defendants," is wrong, two district courts have held it is wrong, and I certainly wouldn't allow it on that basis.

Their second basis that somehow it goes to damages, I think, is equally without merit. The place it has merit, their position has merit, is because Beverly Mann has brought a defamation claim. She says that she was called paranoid and emotionally disturbed and she says that's wrong. Well, whether the has to prove it is wrong or the defendants have to prove it is true, and I think it's the latter, in any event that is now in issue, thus, she places it in issue, not the defendants, by making a defamation claim out of that.

The city has the right to go into it, but there are limits on it in terms of relevance because if today she went and saw a psychiatrist it wouldn't have much, if

any, relevance to what she was like at the time she was fired.

Thus, I have modified Mag4.strate Balog's order to say because of the defamation claim the defendant is entitled to go into this otherwise privileged information but only covering a period during the time she was employed by the city and for two years thereafter. After that, it becomes meaningless or at least marginally relevant and not sufficient in my view to invade a privilege of this sort.

Now that takes care of that and the remaining question is, does she have to come back and be deposed, and I guess the question is has she answered questions about talking or getting mental help from any source during the time she was at the Corporation Counsel's Office and for a period of two years there after.

MR. LEECH: No, sir, your Honor.

THE COURT: She has not?

MR. LEECH: She has not.

MS. COMPO: She has not.

THE COURT: All right. That's what she has to do. She will do that within, and there is no reason to spend much time on this -- I am staggered by the plaintiff telling me how much time has been spent on her deposition. Enough. You take her deposition on that limited point and it is not to exceed one and a half hours in length. When is that going to be done? When is she going to be available for that?

MR. LEECH: We can do that in the next two weeks, your Honor.

THE COURT: Fine. Then we are finished with discovery in this case?

MS. COMPO: Your Honor, we are still cleaning up some matters. There are a couple of depositions that need to be taken. We only have one more deposition after that and that's the deposition of plaintiff's father, Mr. Mann, and the deposition of Mr. Blezenna. We have subpoenaed him again. We may have to go in before Magistrate Balog,because he has not shown up any time we have subpoenaed him.

Mr. LEECH: Let me suggest this, your Honor, without getting into any details on it, we are one of the cases on the civil task force and Judge Bua set the case for a settlement conference, I believe, in early November -- 23.

MR. MORAN: November 15, Judge.

MR. LEECH: I think it might be a good idea if we set a date here to have the pretrial order done by that time and we can work out between us the details of getting this stuff cleaned up. If it doesn't get cleaned up, that's whoever didn't clean it up's problem. I would like to get goingon the pretrial order.

THE COURT: I agree.

MR. MORAN: judge, we have no objection to that, and we also intend to file a motion for summary judgment. We contemplate doing that simultaneously with the pretrial order so as not to delay things.

THE COURT: What -- you know, I have read enough of this. What in heaven's name makes you think you could get summary judgment in this case? There are factual controversies all over it.

MR. MORAN: Well, Judge, I think, for example, there is a variety of different claims and I think that, for example, the defense of qualified immunity may be raised with respect to the Section 1983 count going to the termination of a government lawyer.

In addition, I think there is an absence of evidence of discriminatory intent behind all of these things.

There is a variety of claims, some of which have jury -- a right to a jury trial, others of which do not, so even if we were only partially successful, it might reduce the issues and have an impact or. whether or not the case is tried before a jury or before your Honor.

MR. LEECH: Your Honor, if I could suggest perhaps if you looked at the pretrial order

when it was completed you could determine whether there was any point in a summary judgment motion. I don't think there is. I don't think it's going to affect how the case is tried. I don"t think at this point --

THE COURT: All right. Well, we will worry about that when I get my final pretrial order. I will see you on November 15 with pretrial order in hand.

What time is your meeting with Judge Bua?

MS. COMPO: At 9:15, your Honor.

THE COURT: 9:15? All right. Then why don't you come and see me at 9:00 o'clock, just so you can file the pretrial order, and then you can go and see Judge Bua.

MR. MORAN: I think Judge Bua is at 9:00 o'clock, Judge.

MR. LEECH: Why don't we come in on the 14th, then, your Honor?

THE COURT: All right.

MR. LEECH: Thank you, your Honor.

MR. MORAN: What time will that be on the 14th, Judge? 9:15?

THE COURT: Yes.

MR. MORAN: Thank you, your Honor.

Transcript above certified true and complete.

10/2/89

September 19, 1995

Collins T. Fitzpatrick
Circuit Executive
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. Fitzpatrick:

I bring the enclosed complaint against U.S. District Judges James B. Moran pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

My complaint concerns a lawsuit in which I am the plaintiff. The lawsuit is titled Mann v. City of Chicago, James Montgomery, Timothy O'Hara and Jayne Barnard. The case currently is before your court on cross appeals.

The district court number is 84 C 11020. The appellate court number is 92-3761.

Judge Moran retained the assignment of the case for nearly four years although he had a family relationship with defendant Jayne Barnard that required his recusal. I believe that the judge's retention of the case violated 28 USC 455. He used his position as the judge assigned to the case to engage in a long succession of overtly inappropriate acts on behalf of the defendants, acts that even if not motivated by an obvious conflict of interest, constituted impropriety. My complaint is not solely of a technical violation of 28 USC 455.

I enclose several documents that discuss the specifics of that conduct and its intermediate consequences.

The family relationship at issue is fairly complicated. In the early 1970s, Judge Moran, his wife Robin, and their four minor children were neighbors of attorney John Tucker, his wife Nancy and their four minor children. The families became close friends. In 1975, Robin Moran and John Tucker left their respective spouses and filed for divorce. Shortly thereafter, both divorces were granted and each of the wives was granted primary custody of their respective minor children.

Almost immediately after these divorces, John Tucker and Robin Moran were married. They continued to live as neighbors of their respective former spouses. In 1979, Judge Moran and Nancy Tucker were married. They continued as neighbors of John Tucker and his wife, the former Robin Moran. The eight children of the two respective first marriages moved freely between the two homes of their parents.

After six years of marriage, John Tucker and Robin divorced. In early 1983, Tucker married Jayne Barnard, and they remain married. Barnard and Judge Moran thus share four stepchildren, two of whom were minors at the time of Barnard's marriage to Tucker and all of whom once lived with the judge. Barnard's husband was, for six years, the stepfather of Judge Moran's children, all of whom once lived with John Tucker.

My lawsuit was filed in December, 1984. In sworn testimony in the case, Barnard indicated a close personal relationship with the stepchildren she shares with Judge Moran. In deposition testimony, she referred to one of those stepchildren as "my daughter," and stated that she was preoccupied in August, 1983 with her "daughter's" wedding. At trial, she referred to the children of her stepchildren as her own grandchildren.

At three status hearings in chambers during 1985 at which I was present, the judge instructed the defendants' counsel to file a dispositive motion. There was no court reporter present at these hearings. When the motion finally was filed, as a Rule 12(b)

motion, the judge orally ordered a stay in discovery in the case until he ruled on the motion.

Seven months later, in May, 1986, he entered an order stating that he intended to treat a Rule 12(b) motion as a Rule 56 motion.

My attorney at the time was a neighborhood lawyer who, the judge certainly presumed, normally represented plaintiffs on a contingent-fee basis. That is, he was not sufficiently prestigious to command the attention of the members of your court and obtain an appellate reversal of summary judgment. Already sufficiently aware of the status-oriented culture that dominates federal court practice, I quickly discharged that attorney and retained a sufficiently prestigious one; i.e., the attorney represented corporations as well as individuals, and, most important, charged a substantial hourly fee.

The attorney, R. Peter Carey, had the added status and credibility of having recently argued and won a case before the United States Supreme Court.

The judge began an immediate retreat from his plan to end the case with summary judgment. At the first hearing at which Carey appeared, the judge confirmed that he indeed had intended to grant the defendants summary judgment. He said he would reconsider that decision, though, in light of Carey's appearance on my behalf. He said he had planned to base his ruling upon his presumption that I would obtain no evidence through the discovery process that would support the allegations in my complaint. The premise, which proved incorrect, necessarily was based upon either blind speculation or an out-of-court *ex parte* representation to the judge.

I believe that that hearing was held in open court, with a court reporter present.

In July, 1986, the judge filed a lengthy memorandum opinion ruling on the dispositive motion that was filed at his own instigation. The memorandum opinion was replete with factual inaccuracy and snide commentary, but it treated the motion as a Rule 12(b) motion, not as a Rule 56 motion.

The memorandum opinion dismissed parts of the complaint, most notably parts that addressed mainly Jayne Barnard's conduct. In the following weeks, my attorney filed a series of motions for reconsideration, and, in response, the judge retreated further.

The cost to me in attorneys' fees: approximately $25,000. Had I not happened to have immediate access to that amount of money to pay the legal fees, Judge Moran would have granted summary judgment to the defendants -- on what essentially was his own motion.

The July, 1986 memorandum opinion has had a large, if largely indirect, effect upon the course of the litigation. So has the undue delay of so many years in the progression of this litigation, and threatens further substantial harm. Among the enclosed documents is a copy of a motion I filed recently with the Illinois Supreme Court for leave to file an *amicus curiae* brief on a case that may change pertinent law significantly in favor of the defendants in my lawsuit, and particularly in favor of Jayne Barnard. The case may alter the standard of proof required in lawsuits alleging employer blacklisting of former employees, a key issue in my lawsuit. (Barnard already was assisted significantly by the three-year delay in discovery, courtesy of Judge Moran, when the head of a large insurance in-house law department, who had made, and then retracted, a job offer to me in November, 1984, died in 1987.)

The defendant in the case before the Illinois Supreme Court filed objections to my motion, relying heavily upon the memorandum opinion that Judge Moran entered in my lawsuit as

his ruling on the dispositive motion filed at his own insistence. My motion for leave to file the *amicus curiae* brief was denied.

Also enclosed are lengthy documents detailing other large consequences of the incessant delays in this lawsuit orchestrated by Judge Moran.

Once Judge Moran concluded that he could not kill the lawsuit by entry of a judgment order, he began to try to kill the case by delay. For the following one and one-half years, he refused to enter a discovery order in the case. Month after month at status hearings, my attorneys would ask for the entry of a discovery order, and month after month -- after month after month -- the judge would promise to enter such an order at the next hearing. Only when my attorney in January, 1988 filed lengthy and detailed documents intended obviously as a prelude to a mandamus petition to force the entry of a discovery order did the judge refer the case to a magistrate for discovery purposes.

All of the delay -- *all* of the delay -- during the years when the case was assigned to Judge Moran was at the judge's instigation. The defendants did ask for a number of extensions of time in which to respond to a lengthy request to admit facts, but neither I nor they ever asked that this cause a delay in any other discovery.

I had served the request to admit facts because the judge had so stringently limited the lengths of the defendants' depositions that I was forced to supplement them with written requests for additional information. He refused, however, to place any time restrictions whatsoever upon my deposition, allowing it to extend indefinitely. It lasted for five days over a period of years, and ended only when a subsequent judge granted my motion to end it.

Judge Moran provided other assistance to the defendants, as well. He unabashedly offered specific advice to their counsel

about litigation strategy, telling them which standard defense he thought was most likely to succeed. The lawsuit is an employment case. The judge's advise to the defendants' counsel: proffer that I was discharged from my job because I did not get along with my supervisor, a claim that the person who discharged me denied repeatedly during discovery. This incident occurred during a status hearing in chambers in the spring of 1987. I was not present, but two of my attorneys, Michael J. Leech of Hinshaw & Culbertson and Peter Carey, were. Each, in separate conversations later that day, told me of the judge's statements at the hearing. It was my understanding that a court reporter also was present.

In June, 1988, the United States Supreme Court affirmed that 28 USC 455 actually means what it says and does require judicial recusal in the circumstances described in that statute. I had my attorney draft a recusal motion, and, in preparation, contacted Judge Moran's court reporter and requested transcripts of certain hearings, as well as verification that no court reporter was present at other particular hearings. Shortly afterward, and before my motion was filed, Judge Moran quietly removed himself from the case, trading it for a case from which Judge Paul Plunkett had recused himself.

During the nearly four years that my lawsuit was assigned to Judge Moran, eight case dockets were created from existing ones in the Northern District of Illinois, seven for judges newly appointed to the bench and one for a judge returning from an extended leave of absence. Given this math, it appears likely that the case remained assigned to Judge Moran because he was removing it from the reassignment lottery each time.

Once reassigned to Judge Plunkett, the case remained there for only fourteen months. At a hearing before that judge in September, 1989, the defendants' counsel stated his intention to file a summary judgment motion. The judge responded with dismay, and said that he was familiar enough with the case to

believe that such a motion would be inappropriate. He set a date for the filing of the pretrial order and for the scheduling of a trial date. Shortly thereafter, the case was reassigned to a newly appointed judge, Judge George Lindberg, who, without explanation, granted most of the defendants' eventual summary judgment motion. (The single explanation that Judge Lindberg provided in his order ruling on the summary judgment motion stated his reason for *not* granting the motion on one of the counts.)

Nine new case dockets were created in the Northern District of Illinois during the pendancy of this lawsuit there. The result of the case reassignment lottery served the foreseeable, obvious interests of the defendants *all nine times*.

A number of attorneys representing a cross-section of federal court litigators have told me that Judge Lindberg's conduct in the case was so bizarre that it raises significant questions about his motive for that conduct. They, and I, view some specifics of that judge's conduct as strongly suggesting a desire by him to advertise to Judge Moran support for the defendants, and particularly support for Barnard. In his Findings of Fact and Conclusions of Law, Judge Lindberg lavished Barnard with praise and gratuitously mentioned her husband and the law firm where he was a longtime partner.

Yet Judge Lindberg displayed no bias in favor of the defendants until the defendants filed a summary judgment motion in 1990 that ostentatiously featured Judge Moran's 1986 memorandum opinion. Judge Lindberg's ruling closely mirrored Judge Moran's memorandum opinion in its result. I suspect, and have suspected all along, that Judge Lindberg did not even read my response to that motion before he ruled on the motion.

This complaint alleges conduct that occurred years ago, but the essence of the charge is as verifiable as it ever was. The family relationship between Judge Moran and Barnard is easily

verifiable. So is the judge's entry of his May, 1986 order notifying me that he planned to treat the defendants' Rule 12(b) motion as a Rule 56 motion, and his quick retreat from that position once I retained an attorney of sufficient status. So is the three-year delay before he referred the case to a magistrate for the entry of a discovery order, and that he did so in immediate response to my filing of documents in prelude to the filing of a mandamus petition.

Very truly yours,

Beverly B. Mann
7261 North Campbell Avenue
Chicago, Illinois 60645
312/465-4587

590

April 25, 1995

Judge James Moran
U.S. District Court
Northern District of Illinois
219 South Dearborn Street
Room 2541
Chicago, Illinois 60604

Dear Judge Moran:

Your commentary published recently in the Law Day edition of the Chicago Daily Law Bulletin, in which you speak of notions of fairness and parity inherent within the American system of jurisprudence, reeks of protesting too much.

During the nearly four years in which you presided in my lawsuit against one of your family members (and others), you brazely used your official position to serve the interests of your own famhy. Your actions included the open and repeated instruction to my opposing counsel to file dispositive motions, the lengthy staying of discovery in an oral order on your own motion, the repeated refusal over a period of three years to enter a normal discovery order, and (as a last resort) the recommendation of the bofferplate defense you thought most likely to succeed. (The key defendant later disclaimed the boilerplate defense you reconunended and did not raise it at trial, although, curiously, that defense recently was asserted during oral argument on the appeals in the case.)

One order you did enter, without prompting, indicated your decision to grant summary judgment to the defendants. Already aware of the ways of federal court, I trumped you by promptly firing my unprestigious contingent fee lawyer and retaining a sufficiently prestigious and expensive one, someone who you knew would be able to obtain a reversal of your summeiy judgments on appeal. You immediately backed away from your

position; presumably, you would not have done so had you believed your position was legally supportable.

You told my newly retained attorney that you had planned to grant the defendants summary judgment because you *knew* that, were discovery to proceed, it would produce no competent evidence to prove my allegations. Discovery eventually did proceed, and your prophecy proved wrong. So much for the accuracy of any expahe representations you had received.

"Eventually" is the operative word here, though. It took another one and one-half years, a nd a thinly veiled threat of a mandamus petition, before you referred the case to a magistrate for entry of a discovery order.

You placed strict limits upon the lengths of the depositions of the defendants, but refused to limit the length of my deposition at all. Utimately, my deposition lasted more than four days, over a penod of more than four years. It was ended (in response to my motion) only by order of the first of the two judges who succeeded you in the case. (Curiousfy, the eventual trial judge suggested in the presence of the jurors, without prompting by the defendants' counsel and without factual basis, that I had withheld information improperly from the defendants during discovery.)

Statistical evidence suggests that you deliberately retained assignment of the case, pulling -it ftom the pool of cases available for reassignment on at least some of the eight occasions when it was eligible for inclusion as part of a newly compiled docket. In any event, you did not avail 'yourself of any of those eight opportunities to have the case reassigned without a recusal order, although I have been told reliably that you could have done so. Only when your continued retention of the case became untenable in light. of a new Supreme Court opinion did you relinquish it.

In my mental review of the lengthy litigation, most strildng is the extent to which you and one of your successors on the case suggested or outright supplied the chronically changing defenses. It is the judges rather than the defendants (with the exception of the defendant who is your family member) who have been by far my most aggressive opponents in the litigation.

Contrary to the inference in your commentary, the acceptance of bribes is not the only possible circumstance ofjudicial impropriety; it is only the most obvious one. Nor, contrary to your implication, do all corrupt judges go to prison.

Next year as Law Day approaches, please keep your hypocritical musings to yourself Very truly yours,

Beverly Mann

62a

Judge James B. Moran
U.S. District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Moran:

Enclosed is a copy of a letter I sent to Senator Paul Simon last month as application for appointment to his judicial nominations commission. The letter describes part of my experience in federal court, and some of my resulting concerns, and you will recognize that it addresses the matter of your integrity.

I was not appointed to that commission, but my decision to apply for appointment to it is merely the beginning of a lobbying effort on my part for the amendment of 28 USC 455 to require that a violation of that statute result in the institution of impeachment proceedings against the violating judge.

One year ago, I spoke at length with a member of the staff of the Senate Judiciary Committee concerning your actions in my lawsuit. The staff member recommended that I bring the matter, in formal fashion, to the attention of the chief judge of the Seventh Circuit Court of Appeals. I have not done so because I have been concerned about the psychological effect that such a charge against you might have upon the chief judge, who I presume would prefer to defend your integrity whatever the relevant facts, in any part he may play in the outcome of the cross-appeals in my lawsuit.

I also have had a conversation with Seventh Circuit Court of Appeals Executive Collins Fitzpatrick in which I expressed my fear that the chief judge or other appellate judges with whom you have had a friendly relationship may use the appeals in my lawsuit as a means to defend your integrity; an ultimate ruling in favor of the defendants in my underlying lawsuit, of course, would appear to vindicate you in its implication that your actions constituted only a technical violation of the law. (In my conversation with Mr. Fitzpatrick, I divulged neither the name of the lawsuit nor your name, although perhaps I should have divulged both.)

My case remains on appeal and, because of a number of lengthy delays, will not be considered by the court until next fall. I ask that, when it finally is considered, you

refrain from overt or subtle, direct or indirect, interference in the outcome of the appeal.

Very truly yours,

Beverly B. Mann

64a

January 6, 1993

Senator Paul Simon
462 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Simon:

I am interested in becoming a member of the commission you are creating to recommend potential nominees for court vacancies and for U.S. attorney for the Northern District of Illinois.

I am an attorney, but I also am a plaintiff in an extraordinarily complex and costly employment lawsuit that has been pending in federal court here in Chicago for eight years, and it is in this latter capacity that I apply for membership on that commission. I wish to represent the interests of individuals, as opposed to corporations, who litigate in federal court, and particularly the interests of plaintiffs in employment litigation (whom most current federal judges inappropriately treat differently than they do other litigants).

True representation of this constituency, I assure you, can occur only with the appointment of a member of that constituency to your commission. Our interests occasionally diverge from the interests even of the lawyers who represent us.

My interest in the integrity and the intellectual and professional qualifications of federal judicial appointees is deep, personal and of several years' standing, born of bitter experience. My lawsuit was assigned originally to a judge who, when asked early in the litigation about a family relationship he had with one of the defendants in my lawsuit, profoundly misrepresented to me the nature and extent of that relationship, and who retained assignment of the case for nearly four years. He relinquished assignment of the case only after the Supreme Court issued an opinion holding that 28 USC 455, which addresses recusal of judges, actually means what it says, and my attorney openly began preparation for a recusal motion.

I had learned of the true nature of the relationship of the judge and the defendant by word of mouth among the legal community, and verified it by searching marriage license, divorce and child custody records.

During the period of his assignment to the case, that judge on three occasions requested counsel for the defendants to file a dispositive motion, forcing me to retain high-priced and relatively prestigious counsel to (successfully) fend off summary judgment. Later, that judge unabashedly and repeatedly advised the defendants' counsel with respect to

standard defenses the judge thought were most, and least, likely to succeed in my case. These conversations occurred in the privacy of chambers during status hearings, and usually were conducted without the presence of a court reporter. The judge also refused, for three years, to rule on my request for a general discovery order, finally referring the case to a magistrate for purposes of discovery when my counsel filed documents in obvious preparation for a mandamus petition to obtain the appropriate discovery.

The judge finally transferred the case to another judge in exchange for a case from which the other judge was recusing himself. Eventually, the newly assigned judge stated, on the record and in open court, that he was familiar enough with the substance of the case to know that a grant of summary judgment would be highly inappropriate. Two months later, on the day that judge was scheduled to assign the case a trial date, the case was reassigned to a newly appointed judge. (During the lengthy period when the case remained assigned to the initial judge, seven new caseloads were created from pending cases, six for newly appointed judges and one for a judge returning after a lengthy illness, yet, against the odds, my case was not one of the many in its category to be reassigned to any of these judges.)

The newly appointed judge, George Lindberg, granted most of the defendants' summary judgment motion, incredibly without even a word of explanation, after nearly seven years of litigation including twenty-three depositions, one month before trial was scheduled and two days before the pretrial order was to be filed. The summary judgment motion patently had not met even the technical local procedural requirements for such motions, and it cited not a single material stipulated fact upon which a summary judgment motion of that nature, by statute, could be based.

My legal fees, to date, have totaled nearly $150,000, about two-thirds of it directly the result of the questionable manner in which the court has handled this case. The court's questionable actions also have extended the length of this litigation already by several years.

In the last few years, I have lobbied extensively for legislative action supportive of the rights of employees, and against legislative action detrimental to the rights of employees. During the period of the congressional debates concerning the new Civil Rights Act in the fall of 1991, for example, I discussed at length with aides to a number of senators, including your assistant, Jayne Jerkins, the need to provide for the retroactivity of that statute. I sent you a letter referencing my discussion with Ms. Jerkins. The letter briefly related a part of my experience in federal

court and argued for the need to provide the right to a jury trial in all employment lawsuits brought by virtue of federal statute, including those lawsuits pending at the time of passage of the new Act.

I sent copies of that letter to a number of other senators, including Senator Kennedy, who fought so hard for the inclusion in the Act of a retroactivity provision. (I believe, though, that retroactivity of the 1991 Act, including provision of the right to jury trial, will be inadequate without an additional provision recognizing specifically that employment discrimination lawsuits, by their nature, concern issues of material fact and therefore are inappropriate candidates for summary judgment relating to substantive fact.)

Also in the fall of 1991, at a time when the Judiciary Committee was considering a nomination for judge for the Northern District of Illinois, I wrote to that committee and pleaded for serious review of the professional qualifications of the political nominees that Rep. Michel was submitting for nomination to the bench here. I enclose a copy of that letter.

I also enclose a copy of a letter I submitted on behalf of the National Employment Lawyers Association in the summer of 1991 to the members of the Illinois delegation to the National Conference of Commissioners for Uniform State Laws in which I lobbied against a provision that the commission appeared ready to adopt. The provision would have detrimentally and seriously affected the rights of employment plaintiffs.

In recent weeks, I have spoken at length with your aides, John Trasvina and Amy Isbell, regarding the obvious need to expand significantly the number of judges sitting on the Seventh Circuit Court of Appeals. I noted that a very high number of Seventh Circuit appellate panels include a judge who is not a member of that court but who sits on the panel by designation of the chief judge of the circuit. I noted that the only justification allowed by statute for these designations is a shortage of judges, and that the chief judge is required by statute to certify each time he designates a judge for a panel that such a shortage exists. I also noted the potential for abuse of the extraordinary latitude allowed the chief judge in designating judges, and I noted the rarity of dissent by judges sitting by designation, at least in employment cases, and the corresponding rarity of instances in which designated judges constitute the second vote, on a split panel, in favor of employment plaintiffs.

I spoke earlier this week with your assistant, Katie Van Heuven, concerning my interest in appointment to your new commission, and she advised me to send my letter of application directly to you.

Thank you for your consideration of my application.

Very truly yours,

Beverly B. Mann

726[illegible] North Campbell Avenue
Chicago, Illinois 60645
312/465-4503

68 a

Judicial Council
Of the Seventh Circuit

219 South Dearborn Street
Chicago, Illinois 60604

October 4, 1995

IN RE COMPLAINT AGAINST SENIOR DISTRICT JUDGE JAMES B. MORAN

No. 95-7-372-21

BEVERLY B. MANN
Complainant

For the reasons stated in the accompanying memorandum, this judicial misconduct complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(i) and (ii) and Rule 4(c)(1) and (2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability.

69a

Judicial Council
Of the Seventh Circuit

219 South Dearborn Street
Chicago, Illinois 60604

October 4, 1995

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

No. 95-7-372-21

MEMORANDUM

The complainant has filed a complaint charging the judge with what amounts to failing to recuse himself. The case was reassigned to another judge more than 6 years ago. The complainant argues that the judge should have transferred the case at an earlier time. This complaint is not timely. Even if it was, the issue here of recusal should be resolved on appeal, not by judicial misconduct complaint.

Accordingly, the complaint is dismissed pursuant to 28 U.S.C. §372(c)(3)(A)(i) and (ii) and Rule 4(c)(1) and (2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability.

70a

February 7, 1994

Bryan Richard Boylan
Otitis Media
1926 Du Pont Avenue South
Minneapolis, Minnesota 55403

Dear Mr. Boylan:

I am an attorney with a background in litigation and with significant knowledge of employment-related law. I became familiar with various employment litigation issues beginning nearly a decade ago, not in the course of practicing my profession but because in the fall of 1984 I became a plaintiff in a complicated multi-count employment discrimination lawsuit filed in federal court against my former employer, the City of Chicago. The lawsuit is still pending on cross-appeals, and I expect that it will not be resolved for at least another three years. To date, I have paid more than $150,000 in legal fees and related cost to litigate it.

I plan to write a book that will tell the story of this exceedingly lengthy and costly litigation and, in doing so, will tell the story of the unique manner in which lawsuits alleging employment discrimination (as opposed to litigation of all other types, whether civil or criminal) are treated in federal court. The book will not be complimentary to the federal civil justice system of the 1980s and the 1990s in its handling, of employment discrimination lawsuits.

I am wondering whether you would be interested in representing me in trying to sell a proposal for this book.

My book will include among its assertions the claim that the undue length and costs, financially and otherwise, of my lawsuit are attributable to the deliberately obstructionist conduct of two of the three federal district judges to whom the case was assigned over the years. I will argue that such legally

unauthorized conduct has become commonplace among federal judges during, the last decade in their handling of employment discrimination cases and reflects a concerted policy that aims to obstruct the path of litigation in these cases and improperly control their outcome.

Although I will use my own lawsuit as my major device to illustrate my points, I will support my claims also with brief discussions of judicial rulings and evidence in other employment-related federal lawsuits, and with quoted comments by experienced federal litigators.

My particular lawsuit is more complex than most in its genre, but at its heart are allegations of repeated far-reaching gender-based discriminatory actions by my immediate supervisor, in which the City's corporation counsel ultimately acquiesced in order to serve unrelated political patronage interests. Until recently, gender-based employment discrimination lawsuits against private (nongovernmental) entities and persons could be tried only to the bench, but because I was suing, a government body and government officials, I was able to sue under laws that provided for a jury trial.

I was lucky enough during, the lengthy and expensive discovery process in this litigation to have obtained blatant admissions from both of these individual defendants concerning the issues most central in this case, and so I was able to rely for my evidence largely upon the sworn testimony of these defendants. Yet after seven years of litigation, and one month before the trial was to be-in, the judge, George W. Lindberg (to whom the case only recently had been assigned), entered summary judgment against me on my discrimination counts and, in contravention of procedural law, failed to state the basis for his action.

(I was allowed to try certain other parts of the case to a jury, an tie jury awarded me approximately $143,000. The discrimination counts, though, unlike the counts that the judge did

allow me to try, would have provided for my recovery of attorneys' fees, in addition to substantial other compensation, upon winning. Some of the issues that were tried to the jury dovetailed the discrimination counts which were not, and so the evidence presented at trial was largely the same as it would have been had the discrimination counts been tried.)

I will argue in my book that the federal bench now is comprised largely of judges who appear to view their role on the court not as detached arbiters of law and fact but as the enforcement arm of their particular political ideology. Many of them were placed on the bench specifically to serve this role. These judges refuse, by all manner of subterfuge, to enforce those civil laws that establish public policies with which they disagree, and they place peer pressure upon other judges to do the same; no matter that those laws were established through the democratic political process outlined in the Constitution.

Accordingly, many of these judges regularly use obvious distortion of procedural law or clear misstatement of the factual record in the particular case as their means to avoid enforcement of those federal laws.

Most common among their strategies with respect to employment cases, I will show, is to require plaintiffs in these cases to meet a standard of proof in order to reach trial that is far higher than civil procedural statue expressly prescribes. Federal judges, in fact, often summarily dismiss employment discrimination cases *before trial* by holding that the plaintiff has failed to meet a standard of proof that, upon analysis, actually is higher than that required even of prosecutors *in criminal cases at trial.* They do this unabashedly, although civil procedural law requires only that the plaintiff prove his or her case by a preponderance of the evidence, a far lower standard of proof than the "beyond a reasonable doubt" standard required of the prosecution in criminal cases.

Circumstantial, or indirect, evidence, for example, often is the sole basis for lawful and successful prosecution in all types of litigation, including criminal prosecutions, yet some of these judges hold that circumstantial evidence, however clear and persuasive, cannot serve as the basis for a claim of employment discrimination. In obvious contrast to the types of evidentiary requirements that exist even in criminal cases, these judges hold that the only evidence sufficient to support a claim of discrimination in employment *is unequivocal admission* by the defendant that he or she harbored racial, gender-based or age-based animus.

Less common, but in my view even more pernicious, is the tactic some federal judges use of blatantly misrepresenting the factual evidence presented in the particular case in order to support the judge's foreordained conclusions. Judge Lindberg made liberal use of this tactic in my case when he drafted a statement of facts after the jury trial (as procedural law required of him) in connection with certain of his rulings. The judge, in drafting his statement, failed to acknowledge the presentation of any of the admissions that I had obtained from the defendants, although they were extensive, and instead stated that I had presented no evidence to support my allegations. Few significant facts were disputed in this case, so the judge simply failed in his statement to acknowledge the existence of most of the *agreed* evidence.

One point that *was* disputed concerned the contents of a document solely in the possession of the defendants, and which they failed to submit at trial. The judge, in his statement, adopted the defendants' representation about the contents of the document and failed to mention even that I had disputed their representation and offered a critically different one, much less that the document undisputedly was in the possession only of the defendants and that they had failed to submit it at trial.

Although this judge failed to discuss the evidence actually contained in the record of the case, he did discuss an "occurrence" that is mentioned nowhere in the record. In an effort to support his purported findings of fact, he described an incident that no one (except the judge) ever has alleged, and that never occurred. Equally odd, had such an incident actually occurred, it would have had no relevance to any issue to be determined in my lawsuit. The judge apparently believed that such an incident would create an unflattering portrait of me, and for that reason he included this bit of fiction in his written statement.

My purpose in writing this book is to try to fill the void left by the general media's almost total failure to scrutinize conduct at the district and circuit (i.e., the trial and appellate) levels of the judicial branch of the federal government. For all their anonymity, the judges at these levels play an enormously important role in the designing and the enforcement of federal law. As long as they are protected by a cloak of media inattention to their conduct, they are free to abuse their position of public trust, and many do as a matter of course.

If these judges effectively are repealing the Seventh Amendment right to a jury trial in civil cases, the public at least should be made aware of this. If these judges, for ideological reasons or for any other reasons, are refusing to enforce civil laws duly enacted by the Congress and signed by presidents of earlier eras, the public should be informed of this. If federal judges are no more likely to offer only good faith representations about evidence presented in cases before them than are run-of-the-mill used car salespeople about the condition of the cars they sell, the public should be notified that the age-old warning, *caveat emptor*, now applies as well to factual representations that federal judges make.

I hope also to provoke some public discussion about the system used for selecting these powerful public officials, and to encourage major change in that system. I will show that, most often, the judges who abuse their position of power are those who

the major local bar associations recognized at the time of their nomination to the federal bench as poorly qualified for the position. The federal bench has been flooded during the last decade with political hacks.

My dual role -- as someone with technical knowledge of the legal issues involved and also as an employment discrimination plaintiff for nine years (and counting) in the federal court system -- enables me to discuss these issues from the combined perspective of both. I assume that I am fairly unique in this respect.

I plan to describe issues of legal procedure and legal substance by explaining them in clear lay terms. I hope that litigation attorneys will read the book, but attorneys are not my target readers. (My allegations will not surprise federal litigators; they frequently discuss these issues among, themselves.) My target readers are those with little knowledge of my subject and whose ignorance comes solely from an absence of easily available lay information about it.

My working title is The Law of the Jungle.

Thank you for your consideration of my query. I am enclosing a self-addressed stamped envelope, and I look forward to your reply.

Very truly yours,

Beverly Mann
7261 North Campbell Avenue
Chicago, Illinois 60645
312/465-4587

76 a

Date: 2-7-94

[redacted]

This will confirm the following agreement between me, Beverly Mann, (author), and you, Otitis Media (agent), a Minnesota literary agency.

1. On the following terms, I engage you as my sole and exclusive representative and agent to negotiate for the disposition of rights to a non-fiction book, THE LAW OF THE JUNGLE, submitted directly and explicitly to you--including screen, books, television, and all other related rights--for a period of one year from the date of this signed agreement.

2. I have the right to enter into this agreement with you.

3. I warrant that the material I submit to you is original to me and that no other person has any right to it. I believe my material and its features to be unique and will not conflict with nor infringe upon the rights of any other party.

4. You accept this engagement, and undertake to advise and consult with me at my request, and to exert your best efforts to arrange for the disposition of the rights in my behalf.

5. You will have the right to appoint others to assist you, including your subsidiary or affiliated corporations and associated entities, but in such case I shall not be required to pay more than a single commission.

6. Regarding films and television, in consideration of your services and as compensation for them, I agree to pay you a commission of TEN PERCENT (10%) computed on the GROSS PROCEEDS that I receive during or after the term under all contracts covered by this agreement. On all other literary matters pertaining to books and printed publication, your commission will be FIFTEEN PERCENT (15%) of the GROSS PROCEEDS.

7. Unless explicitly exempted, you will reserve and represent all rights to original projects, i.e., books, film, television, stage adaptation, etc.

8. If for any reason you or I wish to cancel, amend, or alter any or all parts of this agreement, a thirty (30) day notice in writing will suffice.

9. Any controversy arising out of or in connection with this agreement or any breech shall, if you so elect, be settled by arbitration. The arbitrator will be a person experienced in the field which the alleged use was made by you and will be mutually selected by you and me; or, if we cannot agree, then the

rbitrator will be selected by the rules of the American Arbitrator Association. Judgement upon any award by the arbitrators may be entered in any court having jurisdiction.

10. Any formal or contractual communications will be sent by certified mail, addressed to me at:

[redacted]

[redacted]

and to you at 1926 Dupont Avenue South, Minneapolis, MN 55403.
Either of us may designate in writing a different address.

11. If any provision of this agreement is held void or unenforceable, the balance will remain in force.

12. I recognize that you are in the agency business. You will have the right to render to others having creative properties similar to mine, services similar to those you render to me, even though the creative properties of others may be competitive with mine.

13. This agreement will bind my heirs, executors and assigns. You have the right to assign this agreement to any firm or corporation controlled by you, affiliated with you, or a subsidiary wholly owned by you, but no such assignment will relieve you of your responsibilities as outlined in this agreement.

14. This agreement is effective when countersigned by you. You will receive your commission on all contracts you negotiate on my behalf, such commission being assigned and transferred to you as ownership interest in all such contracts you have negotiated.

15. This agreement sets forth our entire understanding.

16. Following the customary practices in both the film and literary professions, all monies shall be payable to you and, after extracting your commission, we shall receive a check from you for the balance.

Agreed to and accepted:

AUTHOR_____

Social
Security_____
Number

[redacted] by

[redacted]

What's so nice about a convict's family?

By BEVERLY MANN

Criminal defense attorney David W. Gleicher, in his article "Sentencing with the Family in Mind" (Law Bulletin Nov. 30), discusses a recent opinion by the 7th U.S. Circuit Court of Appeals that appears to disband the federal sentencing guidelines for criminals, at least those of the white-collar variety, whose *family members* meet standards established by no one but the sentencing judge. The article bills the opinion as an advance in the administration of justice because it allows a variance in sentencing for criminals with particularly needy families.

If this were the extent of the new rule, it indeed would be such an advance, but Mr. Gleicher specifies that the single factual basis for the potential variance in the case that set forth the new rule is that the criminal has a nice family. His children, according to the opinion, are straight-A students, and these model children will suffer "substantially" and (horrors!) perhaps "irreparably" if their father is subject to the penalties that the law requires for those who committed the type of crime he committed. The law does allow for a sentencing variance in extraordinary circumstances, the court said, and the basis for the request for variance in the case they were deciding may qualify.

The federal sentencing guidelines, for all their controversy, do, when enforced, accomplish what was at least ostensibly their primary purpose. The guidelines themselves may be racially and socio-economically charged, but they do serve to eliminate variations in sentencing based on the conscious or subconscious racial and socio-economic preferences of the sentencing judge. Or at least they did.

This recent opinion, *U.S. v. Marius Canoy*, No. 93-3315, is extremely important, Mr. Gleicher advises, and surely he is correct. "Now that family circumstances can be taken into account," he says, "it is imperative that the attorney review the client's family or community situation to determine whether it is 'extraordinary' enough to warrant a departure." Mr. Gleicher only thinly veils his recognition that the opinion in *Canoy* legitimizes precisely the practice that the sentencing guidelines pledged to end: the practice that places "extraordinary circumstances" squarely in the eye of the beholding district judge.

In light of the frivolous grounds that the *Canoy* opinion suggests may be potential justification for a variance of the sentencing guidelines, the opinion advertises this point. The basis for the District Court's determination that the circumstances of this defendant, a white-collar defendant, are extraordinary was neither dire family need due to illness or handicap of a family member nor any demonstrated concern by the defendant for the community as exhibited perhaps by acts such as donations to charity in money or time; neither circumstance apparently was present in this case. The basis was that this defendant has children of the type that any upstanding federal judge would be proud to have — children who likely resemble, at least in socio-economic status, the children of the sentencing judge.

The potential for use of such a criterion as subterfuge for socio-economic criteria, whether consciously or not, is obvious. The determining factor in the district judge's expressed wish to reduce this defendant's sentence may not have been *that* the defendant's children are "A" students but *where* they are "A" students.

Mr. Gleicher specifies that the appellate opinion expressly gives broad discretion to the sentencing judge; the trial judge is in a better position to determine the criminal's family situation, the opinion states, and "any decision regarding the family ties departure by a district judge would be given much discretion by a reviewing court." So "family values" is now officially a mitigating circumstance in the sentencing of white-collar criminals, at least in the 7th Circuit, as is a sentencing judge's belief that model children such as defendant Canoy's should have their heretofore model lives disrupted only minimally.

It is not only criminal defense attorneys who should take note of this opinion, as Mr. Gleicher advises, but anyone with a white-collar job and a nicely situated family. The court has altered the basis for the penalty for white-collar crime. The penalty henceforth will be determined not exclusively by the seriousness of the crime (and related issues) but also, probably, by the quality of the criminal's family members as perceived by the sentencing judge. Those in positions of status whose family members meet the pliable criteria apparently now permitted have a reduced risk of severe penalty for white-collar criminality; the gamble of such criminal conduct is lessened for them.

The federal justice system is downright permeated with deference to litigants who have a lofty social status. Some litigants themselves inherently hold the high status; large or mid-sized business entities and their executives, usually the defendants or defendant parties in interest in civil lawsuits, do. Other litigants who can afford to do so usually purchase the status by retaining as counsel an expensive and clout-heavy law firm, but few individuals can afford to do so.

Too bad for those who cannot. So entrenched in some federal courtrooms is this system of status-determined court rulings that the deference resembles an outright delegation of judicial authority. Occasionally, judges accord this deference, or delegation, at the mere suggestion that someone or something important (a clout-heavy law firm, for example) has, for whatever reason, an interest in the outcome of the case.

The federal sentencing guidelines at least for a while undermined, if only in criminal cases, the aura of legitimacy that deference based on social status has enjoyed in federal court. The opinion in *Canoy* formally reinstitutes it in criminal cases. In civil cases, of course, it simply will continue to be the norm.

Beverly Mann, a licensed attorney who no longer practices law, is a free-lance writer in Chicago.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN,	)	
	)	
	)	No. 84 C 11020
Plaintiffs,	)	
	)	Judge Wayne Andersen
vs.	)	
	)	
JAMES MONTGOMERY, et al.,	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO SERVE DISCOVERY REQUESTS

Defendants, City of Chicago, James Montgomery, Jayne Barnard and Timothy O'Hara, by their attorney, Susan S. Sher, Corporation Counsel of the City of Chicago, move the Court for leave to serve certain written discovery on plaintiff. In support of this motion, defendants state:

1. This case is on remand from the Seventh Circuit. The case involves the 1984 termination of plaintiff from her employment as an attorney with the City of Chicago Corporation Counsel's Office. Two claims remain in the case, plaintiff's defamation claim against defendants Barnard and O'Hara, based on their evaluations of plaintiff's performance, and plaintiff's claim against defendant Montgomery for tortious interference with prospective economic advantage (her purported expectation of continued employment with the City), for discharging her.

2. There has been no discovery in this case since prior to trial before Judge Lindberg in 1991. Defendants need to determine whether plaintiff intends to introduce any new evidence on her remaining claims, including evidence relating to damages.

Therefore, defendants request that they be permitted to serve plaintiff with a request to supplement her responses to defendants' previously served written discovery requests.

3. In addition, defendants should be permitted to discover the bases of plaintiff's remaining claims, in light of certain binding factual determinations of the District Court and the Seventh Circuit's opinion in this case on appeal.

Throughout this litigation, it has been plaintiff's theory that defendants purposely and maliciously terminated plaintiff's employment, or took steps to have her employment terminated, for political reasons. See e.g. ¶ 18, of Plaintiff's Third Amended Complaint. See also pp. 9-14 of plaintiff's opening argument at trial; copy attached as Exhibit A. However, in his Findings of Fact and Conclusions of Law dated November 8, 1991 ("Nov. 8, 1991 Order"; copy attached as Exhibit B), Judge Lindberg found, inter alia, that there was "no evidence, much less clear and convincing evidence, that politics motivated plaintiff's discharge." Id., at 6. The Court also specifically found that there was no evidence in support of plaintiff's theory that defendant Montgomery attempted to create "slots" for attorneys hired by the Washington administration by terminating or reassigning her and others. Id., at 5. Rather, he found that plaintiff and her supervisor in the Torts Division, defendant O'Hara, had a longstanding conflict over plaintiff's reluctance to try cases that was not affected by whether or not plaintiff's political sponsor was in office, and further that defendant

"Montgomery's motivation in running the Law Department generally, and in particular in terminating plaintiff, was to run the Law Department as a high-quality law firm and not on the basis of political patronage." Id.

To prevail on her defamation claim, plaintiff must prove malice. In addition, on her tortious interference claim, the Seventh Circuit has clarified that plaintiff must prove either that defendant Montgomery's actions were intended solely to harm plaintiff, or that his actions were undertaken solely for his own, not his employer's interests. See Order of the Seventh Circuit dated January 19, 1996, at 8; copy attached as Exhibit C.

In light of the above-referenced rulings, defendants are entitled to learn the facts on which plaintiff bases her remaining claims and so should be permitted to serve appropriate interrogatories on plaintiff.

WHEREFORE, defendants respectfully request leave to serve discovery requests on plaintiff.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel
of the City of Chicago

BY: _____
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